No. 80-2104

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CLERK

In The

Supreme Court of the United States

October Term, 1980

BENJAMIN WARD, individually and as Commissioner of Correctional Services, JANICE WARNE, individually and as Superintendent of Bedford Hills Correctional Facility, and PHYLLIS JOAN CURRY, individually and as Superintendent of Bedford Hills Correctional Facility,

Petitioners,

-against-

ELIZABETH POWELL, DALREE MAPP, KATHERINE PURRINGTON, ALTHEA McDANIELS, PAULA HERBERT, CYNDI REED, and MARGARET GATLING, on Behalf of Themselves and all Others Similary Situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: June 1, 1981

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Of Counsel

Questions Presented

1. Does a prison inmate charged with serious misconduct which could result in loss of good time or disciplinary confinement, have a due process right not to be segregated for more than a fixed number of days (here, seven days) pending investigation and the holding of a hearing on such charges?

2. Is it not clear error under *Wolff v. McDonnell*, 418 US 539 (1974), to require in all cases a written statement of reasons for refusing to call a witness requested by the inmate to testify at his disciplinary hearing?

3. Does due process require that Spanish speaking inmates be given notices and statements in Spanish?

4. Is a correctional officer who witnessed or participated in investigation of alleged misconduct disqualified from serving on the disciplinary hearing panel?

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In The

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No. _____

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Petitioners,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the Court of Appeals below is not reported and is reproduced as Appendix B to this petition. The opinion of the United States District Court for the Southern District of New York which was thus affirmed is reported at 487 F Supp 917 and is reproduced as Appendix D. The opinion on the preliminary injunction is reported at 392 F Supp 628, reproduced as Appendix H, affirmed as modified, 542 F 2d 101, reproduced as Appendix F.

Jurisdiction

Jurisdiction is conferred on this Court by 28 USC S 1257 (3). The decision of the Court of Appeals sought to be reviewed was filed on March 4, 1981.

Constitutional and Statutory Provisions Involved

This case involves the first section of the Fourteenth Amendment of the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

This case also involves the New York State Correction Law and Regulations (Appendix I, J).

Statement of the Case

In 1975 the District Court for the Southern District of New York (392 F Supp 628, App H) granted a preliminary injunction in a class action brought pursuant to 42 USC, § 1983 to bring disciplinary proceedings at a New York State prison for women known as Bedford Hills Correctional Facility ("Bedford Hills") which might result in solitary confinement into conformity with due process standards set forth in *Wolff v McDonnell* (418 US 539 [1974]). The preliminary injunction was modified and affirmed on appeal to the Court below in 1976 (542 F2d 101, App F). In 1980 the District Court held the superintendent of Bedford Hills in contempt for failure to comply with the prior order and the injunction was made permanent (App D). The Court below largely affirmed the District Court order (App B).

New York law provides for two major types of prison disciplinary proceedings: Adjustment Committee proceedings and Superintendent's Proceedings, 7 New York Code of Rules and

Regulations ("NYCRR") Parts 252, 253. As summarized below, (A-6)

> "Adjustment Committee Proceedings are designed to effectuate an inmate's 'understanding of and adherence to' the rules governing his behavior, 7 N.Y.C.R.R. § 252.5 (a), and are 'said to be marked by flexibility and non-punitive intent.' *Powell v Ward, supra,* 292 F Supp at 629, quoting *Crooks v Warne,* 74 Civ. 2351, slip op. at 9 (S.D.N.Y. 1974) *vacated,* 516 F.2d 837 (2d Cir, 1975) (judgment for individual inmate in Bedford Hills vacated in light of class relief in *Powell).* The Superintendent's Hearings are strictly disciplinary in nature. 7 N.Y.C.R.R. § 253. *See Powell v Ward, supra,* 392 F. Supp. at 629. Prior to May 19, 1975, both types of proceedings could result in confinement in a special housing unit or segregation unit. *Id.* at 639 n.2. The May 19, 1975 amendments to 7 N.Y.C.R.R. §§ 252.3(f) and 252.5(e) revised the scope of Adjustment Committee action such that the Committee could order that an inmate be kept locked in his cell for a period of time not to exceed two weeks, § 252.2 or that an inmate be confirmed to a special housing unit, provided that the Committee immediately recommended that a Superintendent's Proceeding be held. § 252.5(e)(3). By implication, the 1975 amendment deprived the adjustment Committee of the power to confine an inmate to a special housing unit without an immediate recommendation that a Superintendent's Proceeding be convened. The two-week limitation on keeplocks was reduced to seven days in amendments to § 252.2(e)(2) effective May 12, 1980."

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*The decision granting the preliminary injunction was rendered on April 23, 1975 (392 F Supp 628), prior to the amendments in the regulations noted above.

The decision of the Court below which is sought to be reviewed described the 1975 order, as modified on appeal, as follows, (A7-8)

> "The 1975 Order was designed to require that, in disciplining inmates, defendants comply with the procedural requirements set forth in *Wolff v McDonnell*, 418 U.S. 539 (1974). ***The 1975 Order provided, in pertinent part, as follows:
>
> "1. Defendants shall conduct all Adjustment Committee or Superintendent's Proceedings, or other disciplinary proceedings that may result in an inmate at Bedford Hills Correctional Facility being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures:
>
> a) Formal written notice of charges must be served on the inmate at least 24 hours before the hearing;
>
> b) The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of charges served in accordance with Paragraph 1(a), shall inform the inmate of her right to call witnesses;
>
> c) If permission to call a witness is denied, the party conducting the hearing shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented by the witness;
>
> d) At the conclusion of the hearing, the inmate shall be given a written statement of the evidence relied on and the reasons for any action taken;
>
> e) No person who has participated in any investigation of the acts complained of, or who was a witness to those acts shall be a member of any Adjustment Committee or Superintendent's Proceeding relating to those acts;
>
> "2. If any inmate is confined to Special Housing or segregation 'pending investigation' of charges, a hearing must be held within seven days of the date of

her confinement. In unusual or emergency situations, the seven-day requirement may be extended but only with the permission of the Commissioner of Correctional Services or his designee."

In 1980 the District Court (App D) granted the plaintiffs' motion for an order holding the facility's superintendent in contempt for widespread violations of the 1975 order and entered a permanent injunction. The Court "clarified" the 1975 order to specify that Spanish speaking inmates who cannot read or understand English be given notices and statements in Spanish. The Court of Appeals affirmed. It agreed with the District Court that the evidence of defendants' noncompliance with the 1975 order was clear and convincing and held that the provisions of the contempt order were within the bounds of the District Court's discretion.*

Reasons for Granting the Writ

Wolff v McDonnell, 418 US 539 (1974), provides both a philosophy and a working document defining minimum due process standards to be observed in disciplining prison inmates facing sanctions such as loss of good time or solitary confinement (418 US at 571, fn).

In the litigation at bar the Court of Appeals for the Second Circuit, *inter alia*, has imposed an inflexible rule relating to the inmate's right to call witnesses in plain disregard of this Court's decision in *Wolff*.

Furthermore, a novel due process right has been created by the Courts below for the New York prison system, namely, a right not to be kept in solitary confinement (or its equivalent) beyond a fixed number of days, pending investigation and the holding of a hearing on charges of serious misconduct. Petitioners submit that this requirement seriously violates *Wolff's* hallmark of "mutual

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*The Court below ordered expungement of the class records back to the 1975 Order. It affirmed the award of nominal damages only because "with the exception of the existence of damaging prison records, which will be expunged as a result of the 1980 Order, plaintiffs had not proven any actual injury as a result of defendants' noncompliance with the 1975 Order".

accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application" (418 US at 556).

A.

The order of which petitioner Curry was ruled in contempt, which sets a minimum constitutional standard for prison discipline in all New York State correctional institutions, provides as to the calling of witnesses: (A-7)

> "b) The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of charges served in accordance with Paragraph 1(a), shall inform the inmate of her right to call witnesses;
>
> "c) *If permission to call a witness is denied, the party conducting the hearing shall give the inmate a written statement stating the reasons for the denial,* including the specific threat to institutional safety or correctional goals presented by the witness." (Emphasis added.)

This standard, insofar as it requires a written explanation of the denial, is clearly in conflict with *Wolff.**

This Court in *Wolff* stated no more than that such a statement

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*The fact that not all of the provisions of the 1975 order were appealed does not prevent review by this Court of the entire 1975 Order. *Supreme Court Practice* (5th ed.), Stern and Gressman (§ 2.2, p 53) states:

> "Moreover, the Court on certiorari to review a final decree can reach back and correct errors in the interlocutory proceedings below even though no attempt was made to secure review of the interlocutory decree or even though such an attempt was made without success. *Toledo Scale Co. v Computing Scale Co.*, 261 U.S. 399, 418; *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-258; *Hanover Shoe, Inc. v. United States Machinery Corp.*, 392 U.S. 481, 488, n. 6; *Mercer v. Theriot*, 377 U.S. 152, 153-154."

could be "useful" but firmly concluded that "[t]he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Id.*, at 569. The Court stated:

> "*Although we do not prescribe it,* it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity or the hazards presented in individual cases. *Any less flexible rule appears untenable as a constitutional matter,* at least on the record made in this case. The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, *they must have the necessary discretion without being subject to unduly crippling constitutional impediments.* There is much play in the joints of the Due Process Clause, and *we stop short of imposing a more demanding rule* with respect to witnesses and documents." *Id.*, at 566-67. (Emphasis supplied).

The requirement in the Second Circuit that the notice of charges "shall inform the inmate of her right to call witnesses" raises an expectation of being permitted to "call" witnesses who will testify live before inmates at disciplinary proceedings, absent a written statement of institutional reasons for not permitting it. Where this Court left the question open as a constitutional matter, the Second Circuit has closed the door. The wisdom which led this Court *"not to prescribe"* a rule requiring a statement of reasons for not permitting witnesses to be "called" by the inmate, has been overlooked; the rule has been prescribed.

The calling of witnesses leads to demand for confrontation and cross-examination, which as this Court recognized, presents "considerable potential for havoc inside the prison walls". *Wolff,* 418 US at 567. See, also, *Baxter v Palmigiano,* 425 US 308, 320-22 (1976).

Baxter, supra, involved a similar situation where a Court of

Appeals, purporting to apply *Wolff* standards, held that failure to set forth reasons in writing to inmates denied the privilege to confront witnesses in disciplinary proceedings was *prima facie* abuse of discretion. This Court rejected that reading of its opinion in *Wolff*, stating as follows (425 US at 322):

> "This conclusion is inconsistent with *Wolff*. We characterized as 'useful', but did not require, written reasons for denying inmates the limited right to call witnesses in their defense."

We submit that the Court of Appeals below committed a like error.

B.

This Court has not previously had occasion to pass on the question whether minimal due process safeguards for a prisoner charged with serious misconduct include a fixed time limit on keeping him in solitary confinement (or the equivalent) pending investigation and a hearing on such charges. We respectfully submit that this novel question of constitutional right should be settled by this Court.

The order in question, which purported to reflect the spirit as well as letter of the *Wolff* guidelines (542 F2d at 102), provides in part: (A-8)

> "2. If any inmate is confined to Special Housing or segregation 'pending investigation' of charges, a hearing must be held within seven days of the date of her confinement. In unusual or emergency situations, the seven-day requirement may be extended but only with the permission of the Commissioner of Correctional Services or his designee."

This portion of the 1975 order as modified and as so modified, affirmed by the Court of Appeals in 1976, was interpreted by the Court of Appeals in the order below entered on March 4, 1981, to mean that the hearing not only has to be commenced within seven days, but that it must be concluded within that time to warrant continued confinement where a full due process hearing has not yet taken place and been completed. As the Court found no ambiguity in the word "held", it upheld the order finding the superintendent in contempt of the 1975 provision.

We have been unable to find in any other Circuit a constitutional standard comparable to this seven day rule imposed by the Second Circuit. The rule appears to be uniquely applied to the New York prison system. In fact, the Court of Appeals for the Seventh Circuit, in a case involving an Illinois statute requiring that a disciplinary hearing for prison inmates be commenced within eight days, held that a two-month delay "does not rise to constitutional proportions." *U.S. ex rel. Curtis Houston v. Warden, Stateville Corrrectional Center,* 635 F2d 656, 659(1980). Thus, there appears to be a direct conflict in interpretation of due process standards per *Wolff* between the Second and the Seventh Circuits.

In extending due process requirements beyond those mandated by this Court, the decision below fails to take into consideration the status of the respondents as convicted felons. "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *(Wolff v McDonnell, supra,* 418 US at 556.) To qualify as constitutionally protectible "liberty", the prisoner's interest must be assured either by statute, judicial decree or regulation (*id.*, at 557).

The respondents have no due process protected expectation not to be keeplocked in their cells until charges can be investigated and disposed of. New York State gives statutory authority to a superintendent and his designees to confine inmates to their cells for an unspecified period of time. Section 137, subd. 5 of the New York Correction Law provides: "When any inmate or group of inmates, shall*** resist or disobey any lawful direction, the officers shall use all suitable discipline, to secure the persons of the offenders***." See also, 7 NYCRR 251.6(a) (App J) Section 137, subd. 6, provides: (A-97)

> "The superintendent of a correctional facility may keep an inmate confined in a cell or room, apart from the accommodations provided for inmates who are participating in programs of the facility, *for such periods as may be necessary* for maintenance of order and discipline***." (Emphasis added.)

No statute nor regulation requires that a Superintendent's Proceeding or an Adjustment Committee Hearing be conducted

within a certain period of time after an inmate is keeplocked or assigned to a special housing unit.*

An Adjustment Committee is required to interview an inmate confined to his cell or to a special housing unit at its first meeting following the date of the confinement and may release the inmate or hold him pending disposition of the matter by a Superintendent's Proceeding. 7 NYCRR 252.3(f) (App J). The Adjustment Committee is not required to recommend that a Superintendent's Proceeding be held within any specific period of time (see 7 NYCRR Part 252 (App J), nor do the regulations outlining the procedure for the conduct of a Superintendent's Proceeding require that it be held at nay given time after an inmate is keeplocked to his cell or confined to special housing (7 NYCRR Part 253) (App J).

Respondents do not have the same level of protected due process interest as an inmate enjoying the "conditional liberty" of parole who is facing parole revocation charges (*Wolff v McDonnell, supra,* 418 US at 561-562. As the latter have no due process right to a hearing within a fixed number of days, *a fortiori* the respondents do not. In *Morrissey v Brewer* (408 US 471 [1972]) this Court outlined the minimal due process requirements for parole revocation to include a "preliminary hearing*** *as promptly as convenient* after arrest while information is fresh and sources are available***"(*id.*, at 485), and a final "revocation hearing***tendered *within a reasonable time* after the parolee is taken into custody***."(*Id.*, at 488; emphasis added.)

*The Court of Appeals in its 1976 opinion (542 F 2d at 103) stated that an administrative directive of the New York Department of Correctional Services on March 12, 1975 instructed all institutions to accord confined prisoners an Adjustment Committee hearing within 3 days and a Superintendent's Proceeding within 7 days of such special confinement in the absence of exigent circumstances. The directive referred to was issued by a deputy commissioner and counsel and merely provided that, "an Adjustment Committee or Superintendent's Proceeding***shall be held promptly" and further, "In the absence of exigent circumstances, *as a guideline:* for inmates confined and awaiting an Adjustment Committee proceeding or Superintendent's Proceeding, the Adjustment Committee should be held within three days and the Superintendent's Proceeding within seven days". (Emphasis added.) Under New York law (Constitution Art. IV § 8) the guideline did not have the force of a regulation and should not be accorded any weight on the question here at issue.

Wolff v McDonnell (supra) involved Nebraska's disciplinary scheme, under which in the case of serious misconduct an inmate's good time credit may be ordered to "****be forfeited or withheld and also that the person be confined in a disciplinary cell." (418 US at 546-47). Disciplinary confinement pending the hearing was described as follows (*id.*, at p 552):

> "When a prisoner is isolated in solitary confinement, there appear to be two different types of conditions to which he may be exposed. He may be incarcerated alone in the usual 'disciplinary cell.' with privileges severely limited, *for as long as necessary*, or he may be put in a 'dry cell,' which, unlike regular cells, contains no sink or toilet." (Emphasis supplied.)

This Court did not hold in *Wolff* that an inmate is entitled to a disciplinary hearing within any particular period of time. "As long as necessary" is the proper standard, but the Court below held petitioner Curry in contempt for violating a fixed judicial standard of seven days.

C.

On the question of representation of illiterate inmates, a category comparable to non-English-speaking, this Court said in *Wolff v McDonnell* (at p 570):

> "Where an illiterate inmate is involved...or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff."

Therefore, it was error for the Court below to hold that "due process requires that Spanish speaking inmates who cannot read or understand English be given notices and statements in Spanish". The proper interpretation of this Court's due process standard is that a Spanish-speaking inmate should be free to seek the aid of a fellow inmate or a staff member who is bilingual to assist in the

preparation of his defense, a very different requirement from the one imposed.

Finally, nothing in the record indicates that any of the named plaintiffs is Spanish-speaking. It was error, therefore, to include such a provision in the order. The named class representatives have to "allege and show that they personally have been injured, not that injury has been suffered by other identified members of the class to which they belong" *(Simon v Eastern Kentucky Welfare Rights Organization,* 426 US 26, 40, n 20 [1976], quoting *Warth v Seldin,* 422 US 490, 502 [1975]).

D.

The order in this litigation, purporting to comply with *Wolff* standards, disqualifies anyone who has participated in the investigation from membership on the hearing panel (¶ l[e]). Such an issue was not addressed in *Wolff.* This Court there considered impartiality in the context of having various prison officials on the panel, including as chairman the Associate Warden Custody, and found "no warrant in the record presented here for concluding that the Adjustment Committee presents such a hazard of arbitrary decisionmaking that it should be held violative of due process of law."

Similarly, it is submitted that nothing was presented in the record here warranting *per se* disqualification from membership on the hearing panel of anyone involved with the investigation.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Date: Albany, New York
June 1, 1981

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of March, one thousand nine hundred and eighty-one.

Present: HON. IRVING R. KAUFMAN
HON. AMALYA L. KEARSE
HON. MYRON H. BRIGHT
Circuit Judges,

ELIZABETH POWELL, DALREE MAPP, KATHERINE PURRINGTON, ALTHEA McDANIELS, PAULA HERBERT, CYNDI REED, and MARGARET GATLING, on Behalf of Themselves and all Others Similarly Situated,

#80-2141

Plaintiffs-Appellees-Cross-Appellants

vs.

BENJAMIN WARD, Individually and as Commissioner of Correctional Services, JANICE WARNE, Individually and as Superintendent of Bedford Hills Correctional Facility, and PHYLLIS JOAN CURRY, Individually and as Superintendent of Bedford Hills Correctional Facility,

Defendants-Appellants-Cross-Appellees

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed as modified with costs to be taxed against defendant-appellants in accordance with the opinion of this court.

A. DANIEL FUSARO, Clerk

by Edward J. Ghardaro
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MAR 17 1981

No. 522-3—September Term, 1980

(Argued October 27, 1980 Decided March 4, 1981)

Docket Nos. 80-2141, -2162

ELIZABETH POWELL, DALREE MAPP, KATHERINE PURRINGTON, ALTHEA MCDANIELS, PAULA HERBERT, CYNDI REED, and MARGARET GATLING, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

BENJAMIN WARD, Individually and as Commissioner of Correctional Services, JANICE WARNE, Individually and as Superintendent of Bedford Hills Correctional Facility, and PHYLLIS JOAN CURRY, Individually and as Superintendent of Bedford Hills Correctional Facility,

Defendants-Appellants-Cross-Appellees.

Before:

KAUFMAN, KEARSE, and BRIGHT,*

Circuit Judges.

* Honorable Myron H. Bright, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appeal and cross-appeal from an order of the United States District Court for the Southern District of New York, Charles E. Stewart, *Judge,* 487 F. Supp. 917, that, *inter alia,* entered permanent injunction with respect to procedures to be followed in inmate disciplinary proceedings, held superintendent of correctional facility in civil contempt of preliminary injunction entered in 1975, ordered expungement of certain records, and appointed a special master.

Affirmed as modified.

JUDITH A. GORDON, Assistant Attorney General, New York, New York (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General, Robert A. Forte, Assistant Attorney General, Mary Anne B. Orenstein, Legal Assistant, New York, New York, of counsel) *for Appellant-Cross Appellee*

CHARLES J. TOUHY, Bronx, New York (Elizabeth L. Koob, James S. Braude, Bronx, New York, of counsel) *for Appellee-Cross Appellant*

PER CURIAM:

Defendants-Appellants appeal from an order of the United States District Court for the Southern District of New York, Charles E. Stewart, *Judge,* dated April 29, 1980, as amended by an order dated May 1, 1980 ("the

1980 Order"), 487 F. Supp. 917, holding defendant Phyllis Joan Curry in civil contempt of a preliminary injunction entered June 23, 1975, as modified by this Court on appeal, 542 F.2d 101 (2d Cir. 1976) ("1975 Order" or "Order"). The 1980 Order imposed a fine on Curry, ordered the appointment of a special master to oversee future compliance with the 1975 Order, ordered the expungement of certain records, and awarded plaintiffs damages in the amount of $1 and reasonable attorneys' fees. Plaintiffs have cross-appealed, contending, *inter alia*, that Curry should have been held in criminal contempt, that the expungement order was too limited, and that plaintiffs were entitled to a larger award of damages.

We modify the 1980 Order with respect to the period for which records are to be expunged and, as thus modified, we affirm.

The plaintiffs and the class they represent are inmates at New York's Bedford Hills Correctional Facility ("Bedford Hills") who moved for an order holding defendant Curry, the present Superintendent of Bedford Hills, in contempt of the court's 1975 Order governing disciplinary proceedings against inmates at Bedford Hills. The circumstances that gave rise to the 1975 Order are fully set forth in the prior opinions in this case, 392 F. Supp. 628 (S.D.N.Y. 1975), *affirmed as modified*, 542 F.2d 101 (2d Cir. 1976), familiarity with which is assumed.

The 1975 Order was designed to require that, in disciplining inmates, defendants comply with the procedural requirements set forth in *Wolff v. McDonnell*, 418 U.S. 539 (1974).[1] The types of discipline that were the focus of

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1 In *Wolff v. McDonnell*, the Court restated the principle that inmates in a prison are protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 556. The Court explicitly rejected the argument that "the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment," *id.* at

the Order are those that could result in any of the various "special" confinements that exist at Bedford Hills. Special confinements can result from either an Adjustment Committee or a Superintendent's Proceeding,[2] and can take the form of solitary confinement in a Segregation Unit, restricted freedom in a Special Housing Unit[3] or the

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556-57, and required that inmates subject to such procedures receive a variety of due process rights, including advance notice of charges, written statement of evidence relied upon, the right to call witnesses, and an impartial decision maker. *Id.* at 556-72.

2 New York law provides for two major types of prison disciplinary proceedings: Adjustment Committee proceedings and Superintendent's Proceedings. 7 N.Y.C.R.R. Parts 252, 253. Adjustment Committee Proceedings are designed to effectuate an inmate's "understanding of and adherence to" the rules governing his behavior, 7 N.Y.C.R.R. § 252.5(a), and are "said to be marked by flexibility and non-punitive intent." *Powell v. Ward, supra,* 392 F. Supp. at 629, quoting *Crooks v. Warne,* 74 Civ. 2351, slip op. at 9 (S.D.N.Y. 1974) *vacated,* 516 F.2d 837 (2d Cir. 1975) (judgment for individual inmate in Bedford Hills vacated in light of class relief in *Powell*). The Superintendent's Hearings are strictly disciplinary in nature. 7 N.Y.C.R.R. § 253. *See Powell v. Ward, supra,* 392 F. Supp. at 629. Prior to May 19, 1975, both types of proceedings could result in confinement in a special housing unit or segregation unit. *Id.* at 630 n.2. The May 19, 1975 amendments to 7 N.Y.C.R.R. §§ 252.3(f) and 252.5(e) revised the scope of Adjustment Committee action such that the Committee could order that an inmate be kept locked in his cell for a period of time not to exceed two weeks, § 252.5(e)(2), or that an inmate be confined to a special housing unit, provided that the Committee immediately recommended that a Superintendent's Proceeding be held. § 252.5(e)(3). By implication, the 1975 amendment deprived the Adjustment Committee of the power to confine an inmate to a special housing unit without an immediate recommendation that a Superintendent's Proceeding be convened. The two-week limitation on keeplocks was reduced to seven days in amendments to § 252.5(e)(2) effective May 12, 1980.

3 Placement in either a Segregation Unit or a Special Housing Unit removes a prisoner from the general inmate population. The former places an inmate in solitary confinement. The latter allows inmates who cannot commingle with the general inmate population to commingle with each other. 7 N.Y.C.R.R. §§ 300.2(b) and (c). The district court found the distinction to be minor and not relevant to the issues raised in the class action. 392 F. Supp. 628, 630 n.2.

loss of right to leave a prison cell, called "keeplock."[4] 487 F. Supp. at 925. The 1975 Order provided, in pertinent part, as follows:

> 1. Defendants shall conduct all Adjustment Committee or Superintendent's Proceedings, or other disciplinary proceedings that may result in an inmate at Bedford Hills Correctional Facility being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures:
>
> a) Formal written notice of charges must be served on the inmate at least 24 hours before the hearing;
>
> b) The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of charges served in accordance with Paragraph 1(a), shall inform the inmate of her right to call witnesses;
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> c) If permission to call a witness is denied, the party conducting the hearing shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented by the witness.

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[4] Keeplock is as severe a form of discipline as the other special confinements and potentially even more severe. The district court observed that "[t]he testimony of prison officials and inmates alike indicated that keeplock is the equivalent of solitary confinement, tr. at 316." The court noted that "keeplock is sometimes more restrictive than confinement in the Special Housing Unit, when shower, exercise and other basic privileges are removed." (citation omitted). 487 F. Supp. at 925.

d) At the conclusion of the hearing, the inmate shall be given a written statement of the evidence relied on and the reasons for any action taken;

e) No person who has participated in any investigation of the acts complained of, or who was a witness to those acts shall be a member of any Adjustment Committee or Superintendent's Proceeding relating to those acts;

2. If any inmate is confined to Special Housing or segregation "pending investigation" of charges, a hearing must be held within seven days of the date of her confinement. In unusual or emergency situations, the seven-day requirement may be extended but only with the permission of the Commissioner of Correctional Services or his designee.

1975 Order at 1-2.

The present motion for contempt and other relief on behalf of the class was filed in the spring of 1979. Plaintiffs contended that defendants had failed to follow the procedures mandated by the 1975 Order with respect to Adjustment Committee proceedings and Superintendent's Proceedings.

District Court's Findings of Noncompliance

The district court held several days of hearings on plaintiffs' motion; nine members of the plaintiff class testified; more than a dozen affidavits were submitted; approximately 500 pages of documents were received in evidence. After evaluating all the evidence, Judge Stewart found, in a thorough and thoughtful opinion, that Curry had "failed to comply in significant respects with virtually

every provision of our order." 487 F. Supp. at 933. In particular the court found that the 1975 Order had been violated in the following respects:

> (1) *Adjustment Committee proceedings:* Despite the express mention of the Adjustment Committee in paragraph 1 of the 1975 Order, defendants had made no effort to conduct any of the Adjustment Committee proceedings in accordance with the procedures mandated by the 1975 Order.
>
> (2) *Notice of Charges:* Defendants had failed to give inmates notices that adequately disclosed the substance of the offenses with which they were charged,[5] in violation of ¶ 1(a) of the 1975 Order. The only specification of the nature of the offense charged was citation to a code number; to find out what offense is covered by the code number an inmate must refer to the "Standards of Inmate Behavior" rule book, which (a) is not always readily available to inmates, (b) often lists categories of offenses in general or ambiguous terms, and (c) is subject to varying interpretations by different prison officials.
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> (3) *Witnesses:* Defendants had failed to notify inmates that they may call witnesses to testify in their behalf, in violation of ¶ 1(b) of the 1975 Order. In addition, witnesses were not allowed to be present at the hearing. To the extent that defendants interviewed witnesses requested by inmates they did so

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5 The court found also that notice was sometimes given less than twenty-four hours in advance, in violation of ¶ 1(a); indeed several inmates testified that they did not receive notice until the hearing began. The court found, however, that the substance of such notice as was given was so unenlightening that the inmates' due process rights were not further eroded by the untimeliness. 487 F. Supp. at 926-27.

outside the presence of the inmate and tape-recorded all or part of the interview; they did not normally incorporate the interview into the record of the hearing and they did not allow the inmate to hear the tape or see a transcript of the interview. The court ruled that ¶ 1(b) must be interpreted to allow witnesses to be present at disciplinary proceedings unless the appropriate officials determine that this would jeopardize institutional safety or correctional goals; in the latter circumstances, a written explanation must be given to the inmate.

(4) *Explanation of Denial of Request for Witnesses:* Defendants had not given inmates written statements of their reasons for denying requests for witnesses, in violation of ¶ 1(c) of the 1975 Order. The court rejected defendants' contention that explanation is required only when the denial is based on grounds of institutional safety or correctional goals.

(5) *Statement of Evidence and Reasons for Disposition:* Defendants had failed, at the close of any Adjustment Committee proceeding and at the close of some Superintendent's Proceedings, to give written statements specifying the evidence relied on and the reasons for any action taken, in violation of ¶ 1(d) of the 1975 Order. Some of the written statements that had been given following Superintendent's Proceedings had been inadequate to disclose the evidence relied on.

(6) *Membership of the Hearing Committee:* Defendants had allowed hearing officers to conduct investigations of the acts complained of, and had allowed persons involved in the relevant incident to

preside over the inmates' hearing, in violation of ¶ 1(e) of the 1975 Order.

(7) *Hearings Within Seven Days of Confinement:* Defendants had kept inmates confined in special units for periods substantially longer than seven days "pending investigation" of charges, in violation of ¶ 2 of the 1975 Order. The court rejected defendants' contention that inmates could be kept so confined indefinitely "pending investigation" so long as a hearing was commenced within seven days of the initial confinement.

(8) *Notice in Spanish for Spanisn Speaking Inmates:* Defendants had given notices and statements only in English although several inmates testified that they did not speak or understand English and could not fully understand what went on at the hearing. The court therefore clarified the 1975 Order to specify that due process requires that Spanish speaking inmates who cannot read and understand English be given notices and statements in Spanish.[6]

On the basis of these findings the court concluded that although nearly five years had passed since the 1975 Order was issued, "the due process violations that were enjoined at that time are still widespread." 487 F. Supp. 935. The court found that defendants had in several instances adopted interpretations of the 1975 Order that

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6 Thus, in the 1980 Order, Judge Stewart ordered that ¶ 1(c) of the 1975 Order be amended so as to require explicitly that notice of charges, statements of evidence relied on, and statements of reasons for actions taken be given in Spanish to inmates who cannot read and understand English. Defendants have challenged the district court's findings on this issue only on the ground that the court lacked jurisdiction to order this clarification, contending that no plaintiff was, in fact, illiterate in English. We find that the evidence was sufficient to support the clarification.

were at odds with both the clear language and the intent of the Order, and that they had adopted procedures that contravened provisions of the Order. The court noted that this was not the first time it had been necessary to hold that the procedures employed at Bedford Hills were not in compliance with the 1975 Order.[7]

The court found that Curry had "not [been] reasonably diligent in complying or even attempting to comply with" the 1975 Order. *Id.* at 933. She had been Superintendent for some nine months before she even learned of the existence of the Order, and apparently lacked sufficient concern for the actual state of compliance efforts once she did learn of the Order. While not questioning Curry's good faith, the court found inexcusable such ignorance on the part of an official responsible for achieving compliance with the Order.

Remedies Ordered

On the basis of all but two of the above findings[8] the court held Curry in civil contempt of the 1975 Order. Declining to find that her noncompliance was willful, the

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7 Apparently the first intimation to the court that the 1975 Order was not being obeyed came in December 1976, when three members of the plaintiff class moved to hold then-Superintendent Warne in contempt for noncompliance with the Order. The district court did not hold Warne in contempt but ordered that all references to the incident that gave rise to the motion be expunged from those plaintiffs' correctional facility and parole files. The court also awarded the plaintiffs attorneys' fees and expressed its concern with the "indications" of noncompliance with the 1975 order. 74 Civ. 4623, June 2, 1977 (order).

8 The court noted that its ruling of contempt was not based on those parts of the 1975 Order that were less than clear at the time of the defendants' noncompliance—to wit, the requirement that witnesses be allowed to be present at hearings pursuant to ¶ 1(b), 487 F. Supp. at 928, n.10, and the requirement that notices and statements be given in Spanish to inmates unable to read and understand English. *Id.* at 932 n.14.

court denied plaintiffs' motion to hold Curry in criminal contempt.

Seeking principally to cause defendants to achieve and maintain disciplinary proceedings that are in accordance with due process, the court ruled that the preliminary injunction embodied in the 1975 Order "shall constitute permanent injunctive relief," and concluded that a fine was necessary to demonstrate to defendants the seriousness of their noncompliance and "to generate the effort necessary to bring about prompt and meaningful compliance with [the 1975 Order] and the Constitution." *Id.* at 935. Accordingly, the court imposed on Curry in her capacity as Superintendent of Bedford Hills a fine of $5000 to be paid within one month from the date of entry of the 1980 Order, plus $1000 thereafter for every additional day of noncompliance. The court provided that the contempt could be purged if compliance were achieved within that thirty-day period. In addition, given Curry's lack of diligence and lack of concern for compliance with the 1975 Order, the court determined to appoint a special master to oversee compliance with the Order and report periodically to the court concerning defendants' progress.

In order to compensate the victims of the defendants' noncompliance with the 1975 Order, the court ordered that for the period between June 24, 1977 and the date of the 1980 Order, the records of all Adjustment Committee proceedings, and of such Superintendent's Proceedings as the special master finds violated the 1975 Order, be expunged. The order of expungement excluded, on grounds of res judicata, certain records of class member Janie Harris, who had previously sought and been denied expungement of those records in state court.

Finding that expungement would remedy a significant portion of the injury suffered by the class as a result of

the noncompliance with the 1975 Order, and that plaintiffs had not adequately demonstrated any other actual injury, the court declined to award more than nominal damages. The court ruled that plaintiffs were entitled under 42 U.S.C. § 1988 to recover reasonable attorneys fees.

Defendants have appealed from virtually all of the 1980 Order. Largely on the basis of their interpretation of the 1975 Order as not having application to Adjustment Committee proceedings, they assert chiefly that the Order was not sufficiently clear to support a finding of contempt, and that the evidence of noncompliance was not sufficiently clear and convincing to support the relief ordered. Plaintiffs have cross-appealed, contending principally that Curry should have been held in criminal contempt, that all of plaintiff Harris's records should be included in the expungement order, that the period for which inmate records should be expunged should begin on June 23, 1975, and that the court should have awarded them substantial compensatory and punitive damages. We find no merit in any of defendants' contentions. As to plaintiffs' arguments, we agree only that the period for which expungement of records is ordered should be expanded. In all other respects we find the 1980 Order was proper. Few of the arguments made to us on appeal require extended discussion.

A. *Contempt*

A court has the inherent power to hold a party in civil contempt in order "to enforce compliance with an order of the court or to compensate for losses or damages." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). *See Vuitton et Fils S.A. v Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979); *Sunbeam Corp. v. Golden*

Rule Appliance Co., 252 F.2d 467 (2d Cir. 1958). *See generally United States v. United Mine Workers*, 330 U.S. 258, 302-04 (1947). The power may properly be exercised only if the order is clear and unambiguous, *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 75-76 (1967), the proof of noncompliance is "clear and convincing," *NLRB v. Local 282, International Brotherhood of Teamsters*, 428 F.2d 994, 1001-02 (2d Cir. 1970), and the defendant has not "been reasonably diligent and energetic in attempting to accomplish what was ordered." *Aspira of New York, Inc. v. Board of Education*, 423 F. Supp. 647, 654 (S.D.N.Y. 1976). We find that all of these prerequisites have been satisfied.

Our review of the 1975 Order satisfies us that every provision relied on by Judge Stewart to support the contempt ruling is clear and unambiguous. Only two such provisions are strenuously challenged by defendants. Their principal contention is that the 1975 Order either excluded or did not clearly include Adjustment Committee proceedings. This argument borders on the frivolous. Paragraph 1 states, "Defendants shall conduct all Adjustment Committee or Superintendents' Proceedings, or other disciplinary proceedings that may result in an inmate . . . being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures . . . ." Defendants' attempt to read "Adjustment Committee" out of the 1975 Order was charitably described by the district court as "grammatical gymnastics." If, as defendants would have us believe, Adjustment Committees do not have the power to order solitary confinement or the like (so that the 1975 Order perhaps *should* not have applied to Adjustment Committees), their appropriate remedies were to appeal this portion of

the 1975 Order, which they did not do,[9] or to seek modification of the Order in the district court, which they have not done. Perhaps the reason they did neither is that in fact Adjustment Committees in 1975 had the power to order a keeplock for up to two weeks, and currently has the power to order such confinement for up to seven days. *See* note 2, *supra.* The district court noted that a keeplock is sometimes even more restrictive than confinement in a Special Housing Unit, *see* note 4, *supra,* and this Court had held that such keeplocks provide the necessary predicate for recognition of due process rights under *McDonnell. McKinnon v. Patterson,* 568 F.2d 930 (2d Cir. 1977), *cert. denied,* 434 U.S. 1087 (1978). In any event, the application of the 1975 Order to Adjustment Committee proceedings is clear and unqualified.

Nor can defendants' interpretation of paragraph 2 of the 1975 Order as allowing indefinite special confinement, so long as a hearing is merely *commenced* within seven days, be accepted. Paragraph 2 clearly requires a hearing to be "held" within seven days, and provides a procedure for emergency extensions. Both the Order and the prior opinions in this case make it clear that the central concern was protecting inmates from prolonged confinement prior to a determination of charges. *See* 392 F. Supp. at 632; *see also* 542 F.2d at 103. We reject defendants' contentions that this provision of the Order is ambiguous.

We agree also with the district court's view that the evidence of defendants' noncompliance with the 1975

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[9] On appeal from the 1975 Order, defendants challenged only two provisions. One related to the membership of Adjustment Committees and Superintendent's Proceedings panels; the other related to the then-inflexible time limitation on holding an inmate in special confinement pending investigation. Both provisions were modified by this Court. 542 F.2d at 102.

Order was clear and convincing.[10] As to Adjustment Committee proceedings, defendants concede that they made no effort to institute the procedures set forth in the 1975 Order. Defendants also concede that on several occasions they failed to advise inmates of their rights to call witnesses, and that they never advised an inmate of the basis of a decision not to call a requested witness. In addition to these concessions, there was ample evidence that defendants' formal notices of charges were usually inadequate to disclose the substance of the offense

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10 Defendants' argument that the court's receipt of evidence from class member Luz Santana was improper on grounds of res judicata is untenable. In early 1978, Santana brought a proceeding under N.Y.C.P.L.R. Article 78, claiming that her Superintendent's Proceeding failed to conform with state rules and regulations and seeking annulment of the Proceeding. Federal constitutional claims were not asserted, and her petition was granted based on state law grounds. *Santana v. Superintendent, Bedford Hills Correctional Facility,* No. 2877/77, March 13, 1978 (Article 78 Proceeding, Sup. Ct. Westchester Co.). Res judicata thus does not bar Santana's assertion here of her claims based on the 1975 Order. *See Ornstein v. Regan,* 574 F.2d 115, 117 (2d Cir. 1978).

A similar assertion as to Harris has greater merit. Harris, as discussed *infra,* is barred by res judicata from obtaining here the individual relief that was denied her in her Article 78 proceeding. While the prior judgment against Harris does not preclude the class from litigating its classwide claims, nor bar Harris from enjoying the benefits of relief ordered on a classwide, rather than an individual, basis, *see Sledge v. J. P. Stevens & Co.,* 585 F.2d 625 (4th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979), we note that the district court apparently referred to Harris as one of several inmates who had testified that they were not notified of the right to call witnesses. In Harris's Article 78 proceeding, the court expressly found that she had in fact received such notice. Harris was thus collaterally estopped from relitigating this factual issue, *see* Restatement of Judgments § 68 (1942), and we see no basis for allowing the class to rely on Harris's barred contention in support of classwide relief. Nevertheless, the proof of defendants' noncompliance with the 1975 Order is clear and convincing even without Harris' testimony. The district judge does not appear to have placed great reliance on Harris's testimony; his thorough opinion cites to it only twice among the scores of transcript citations, and her testimony was not the sole support for any proposition.

charged and were often untimely, as well as extensive evidence of defendants' failure at the close of disciplinary proceedings to give the required written statements of the evidence relied on and the reasons for the action taken. There was also sufficient evidence—and no genuine dispute—that the officials who conduct the disciplinary hearings have sometimes been involved in the events complained of or are allowed to conduct investigations relating to the matter before them.[11] And there was ample evidence that inmates were kept in seclusion without a determination of charges far longer than the seven days permitted by the 1975 Order: the court cited several instances ranging from thirteen to sixteen days, and we note other evidence of such confinements for up to twenty-two days.

Finally, the evidence was more than adequate to support the finding that Curry was not reasonably diligent in attempting to ensure compliance with the 1975 Order. Her "apparent ignorance" of the 1975 Order for nearly a year after she assumed office, 487 F. Supp. at 934, her determination "apparently unilaterally and in the face of contrary views of her predecessors and superiors, that the language and spirit of the order could be ignored," *id.* at 933, and her "apparent lack of concern for the actual state of compliance efforts over the last few years," *id.* at 935, are inexcusable.

In all the circumstances, the court's ruling that Curry is in civil contempt of the 1975 Order was entirely appropri-

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[11] Defendants' argument that there has been no clear and convincing evidence that these hearing officers were not impartial is beside the point. The Order sets clear procedural standards for defendants to meet; defendants, equally clearly, have not met those standards. We need look no farther in order to determine whether defendants have complied with th order.

ate.[12] The specific provisions of the contempt order are clearly designed to induce compliance with the 1975 Order, and are well within the bounds of the court's appropriate exercise of its discretion. *See Vuitton et Fils S.A. v. Carousel Handbags, supra; Morgan v. Kerrigan,* 530 F.2d 401, 427 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976) (appointment of special master). *See generally United States v. United Mine Workers, supra.*

B. *Expungement*

In all the circumstances, the court's order that the records of proceedings that did not comply with the 1975 Order be expunged was an appropriate remedy to compensate plaintiffs for the continued violation of their rights. However, challenges by plaintiffs to two aspects of the court's expungement order deserve attention.

First, the court excepted from its expungement order certain records of class member Harris, on grounds that Harris had already litigated (to an unsuccessful conclusion) her entitlement to such expungement in a state order proceeding pursuant to N.Y.C.P.L.R. Article 78. *See* note 10 *supra.* This ruling was correct. A prior state proceeding, including an Article 78 proceeding, will preclude relitigation of a civil rights claim in a federal court if the state proceeding reached the federal constitutional issues involved. *Ornstein v. Regan,* 574 F.2d 115, 117 (2d Cir. 1978); *Ellentuck v. Klein,* 570 F.2d 414, 422-25 (2d Cir. 1978); 8 Weinstein—Korn-Miller, New York Civil Prac-

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[12] Assuming that an appropriately clear order has obviously not been complied with, a defendant should not be held in criminal contempt unless the noncompliance is found beyond a reasonable doubt to have been willful. *United States v. Greyhound Corp.,* 508 F.2d 529, 531 (7th Cir. 1974). In the present case the district court expressly declined to find Curry's noncompliance willful. A ruling of criminal contempt would thus have been inappropriate.

tice, ¶ 7801.02 [4], n.10 (1971). The basis for Harris's Article 78 petition was the failure of defendants to obey various provisions of the 1975 Order with respect to a Superintendent's Proceeding concerning her. The state court assumed the applicability of the 1975 Order, but found against Harris on the facts. *Harris v. Curry*, (Sup. Ct. Westchester Co. June 15, 1979). Her attempt here to have the records of that Superintendent's Proceeding expunged was properly held barred by res judicata.

Second, plaintiffs contend that the court should have ordered the expungement of records of offending proceedings dating back to June 23, 1975, the date of the 1975 Order, rather than just to June 24, 1977. We agree. The court's finding of noncompliance with the 1975 Order was not limited to the period following June 24, 1977, but rather related to the entire life of the 1975 Order. It appears that the court ordered the expungement period to commence with the later date because it had already entered an expungement order for the period prior to June 24, 1977. *See* 487 F. Supp. at 936; *see* note 7, *supra*. However, the earlier expungement order related to only three inmates, not to the class as a whole. In light of defendants' consistent noncompliance and the choice of expungement as the means of redressing the resultant injuries to the plaintiffs, we conclude that expungement relief for the earlier period should be awarded on a classwide basis. *See Vuitton et Fils S.A. v. Carousel Handbags, supra*. Accordingly paragraphs 6 and 7 of the 1980 Order are modified to substitute "June 23, 1975" for "June 24, 1977."

C. Damages

Little need be said about the district court's ruling as to damages. It is settled that if actual injury is established,

an award of damages may not be withheld.[13] *See Vuitton et Fils S.A. v. Carousel Handbags, supra; Yanish v. Barber,* 232 F.2d 939, 947 (9th Cir. 1956). Judge Stewart found, however, that with the exception of the existence of damaging prison records, which will be expunged as a result of the 1980 Order, plaintiffs had not adequately proven any actual injury as a result of defendants' non-compliance with the 1975 Order. We cannot say that this finding is clearly erroneous. We thus conclude that the court's award of nominal damages, in accordance with the principle enunciated in *Carey v. Piphus,* 435 U.S. 247, 263 (1978), was proper.

The judgment of the district court is affirmed as modified. Costs are awarded to the plaintiffs.

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13 Curry claims that her position entitles her to immunity from a damage award. As she was sued in her official capacity, Curry is entitled to a "good faith" defense in a suit for damages brought under 42 U.S.C. § 1983. *Wood v. Strickland,* 420 U.S. 308, 317-22 (1975). This defense is unavailing, however, if she knew or should have known that her conduct violated a constitutional norm. *Procunier v. Navarette,* 434 U.S. 555, 562 (1978). The 1975 Order and the litigation leading to it put Curry and her predecessors on notice that the Order was designed to require due process in Adjustment Committees and Superintendent's Proceedings. They knew or should have known, therefore, that the noncompliant procedures used at Bedford Hills violated the constitutional rights of the inmates at the facility. The district court was correct in ruling that Curry is not immune from a judgment for damages.

APPENDIX C

April 29, 1980 Order on Motion for Contempt

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF

ELIZABETH POWELL, et al.,

Plaintiffs

-against-

74 Civ. 4628 (CES)

ORDER

BENJAMIN WARD, et al.,

Defendants.

STEWART, District Judge:

The parties have filed objections to our order of April 15, 1980. In light of these objections, we have modified the order in several respects. Paragraph 2(c) shall include Notice of Disciplinary Proceedings in Spanish and a provision shall be included requiring that the inmates and staff at Bedford Hills be notified of the entry of the order and copies be posted or otherwise be made available to the class.

Plaintiffs have objected to the stay of the provisions requiring the expungement of records of disciplinary proceedings, claiming that such a stay denied "Plaintiff any meaningful relief from defendant's unconstitutional actions." As we have stated in our memorandum of April 15, 1980, if the expungement provision is not stayed pending appeal, there may be no way to restore the status quo. In our view, an appropriate balance can be struck between the competing concerns of the parties by adding to paragraph 10 a provision prohibiting the use of records of disciplinary proceedings found to be in violation of our order pending determination of the appeal.

Plaintiffs have also objected to the failure of our order to require expungement of records of proceedings before June 24, 1977 that were conducted in violation of the June 23, 1975 order. Although we recognize that violations of the order prior to June 24, 1977 may in fact have occurred, there is no strong showing of violations prior to that time in the record. We are cognizant of the seriousness of our findings concerning defendant's compliance and are unwilling to impose a remedy in the absence of a clear showing that violations had occurred.

Finally, plaintiffs complain that the order requires compliance within sixty (60) days rather than thirty (30) days, as set forth in our decision of February 27, 1980. Upon consideration, we have concluded that sixty days is a reasonable amount of time within which to achieve compliance with our order. To avoid confusion, we have established specific dates by which compliance must be achieved and reports must be made to the Court.

The remaining objections have been considered at an earlier time. Therefore, the order as modified and amended shall read as follows:

The action having come on for hearing before the Court without a jury on March 29, 1979 and June 18, 19, 21, 25 and 29, 1970, Honorable Charles E. Stewart, Jr., presiding, on plaintiff's motion for an Order holding defendant Phyllis Curry, Superintendent of Bedford Hills Correctional Facility, in civil and criminal contempt for failing to comply with the preliminary injunction order entered herein on June 23, 1975 and for other related relief, and the court after due deliberation, on February 27, 1980, having issued its decision thereon, it is

1. ORDERED that paragraphs 1 and 2 of the preliminary injunction entered against defendants on June 23, 1975, modified by the Court of Appeals, 542 F.2d 101 (2d Cir. 1976), and amended below, shall constitute permanent injunctive relief; and it is further

2. ORDERED that paragraphs 1(b) and (c) shall read as follows:

(b) An inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of charge in accordance with paragraph 1(a) shall inform the inmate of her right to call witnesses. The witnesses called shall be allowed to testify at the hearing in the presence of the inmate

unless the Hearing Officer determines that this will jeopardize institutional safety or correctional goals. If an inmate is not permitted to have witnesses present, the witness may be interviewed out of the presence of the inmate and such interview recorded. The record of the witness' statement is to be made available to the inmate at the hearing unless the Hearing Office determines that so doing would jeopardize institutional safety or correctional goals. Whenever a witness' statement is refused an inmate, a written explanation of such denials shall be furnished to the inmate. If an inmate requests a number of witnesses, and the Hearing Officer determines that some of these witnesses are cumulative, those witnesses may be excluded on that ground.

(c) Spanish speaking inmates who cannot read and understand English must be given notice of charges and statements of evidence relied upon and reasons for actions taken in Spanish and provided with a translator who should be present at the hearing; and it is further

3. ORDERED that defendant Phyllis Curry, as Superintendent of Bedford Hills Correctional Facility, is held in civil contempt for her failure to comply with this Court's order of June 23, 1975; and it is further

4. ORDERED that defendant Phyllis Curry in her capacity as Superintendent of Bedford Hills Correctional Facility is fined the sum of $5,000 to be paid on June 27, 1980, and $1,000 thereafter for every additional day that Bedford Hills Correctional Facility is not in compliance with this judgment and order, provided however that the contempt finding may be purged and the fine revoked by the Court if compliance is achieved as of June 27, 1980; and it if further

5. ORDERED that a Special Master be appointed to monitor compliance with and implementation of this order. The function of the Special Master shall be to ensure that all disciplinary proceedings are conducted in compliance with this order and the Court's opinion of February 27, 1980.

(a) In order to carry out her duties, the Master or her delegates shall have unlimited access to the premises of Bedford Hills Correctional Facility, and to any records, files or papers maintained by the defendant.

(b) The Special Master shall have the authority to conduct confidential interviews at any time with any staff member,

employee or inmate of Bedford Hills Correctional Facility. The Special Master or her delegate may attend any institutional meetings or proceedings.

(c) The Special Master shall be empowered to require written reports from any staff members or employees at Bedford Hills Correctional Facility concerning compliance with this order. She may recommend procedures and propose forms to the Superintendent to assist in achieving compliance with this order.

(d) The Special Master shall be empowered to hold hearings and to call witnesses as she deems necessary to carry out her duties.

(e) The Special Master is authorized with prior approval of the Court to select and hire such staff and consult such expert consultants as are necessary to carry out her duties under this order. Adequate offices, equipment and supplies shall be made available by the defendants.

(f) The Special Master shall be allowed a reasonable fee to be determined by the Court, for her services and the services of any authorized assistants, and necessary expenses related to the performance of those services. Such fees and expenses of the Special Master shall be taxed as part of the costs of this proceeding and assessed against the defendant in her official capacity.

(g) The Special Master shall report to the Court on July 11, 1980 concerning defendant's compliance with this order. Thereafter she shall report no less than every ninety (90) days concerning the state of defendant's compliance with this order; and it is further

6. ORDERED that the records of all Adjustment Committee Proceedings for the period June 24, 1977 through the date of this order by expunged by June 27, 1980; and it is further

7. ORDERED that the disciplinary records fo Superintendent's Proceedings conducted between June 24, 1977 and the date of this order that plaintiffs demonstrate to the Court to have been conducted in violation of the order of June 23, 1975 as modified on appeal shall be expunged, provided that the records of Janie Harris' Superintendent's Proceeding dated June 15, 1979 need not be expunged. The Special Master shall hold hearings on such

Proceedings and report to the Court her findings and recommendations; and it is further

8. ORDERED that defendant is to pay over one dollar to the class; and it is further

9. ORDERED that upon due application plaintiffs' attorneys shall be entitled to reasonable attorneys' fees and costs; and it is further

10. ORDERED that upon the filing of a notice of appeal of this judgment, paragraphs 6 and 7 of this order shall be stayed pending determination of defendant's appeal, except that no Adjustment Committee Proceedings, and no Superintendent's Proceeding found to have been conducted in violation of the June 23, 1975 order shall be considered for any purpose pending determination of any appeal; and it is further

11. ORDERED that within ten (10) days of the entry of this Order, defendant Curry shall cause copies of this Order to be posted in each building used to house inmates and in the legal library, and shall make copies available to all employees at Bedford Hills. [*]

Charles E. Stewart, Jr.
United States District Judge

DATED: New York, New York
April 29, 1980.

[*] Paragraph renumbered "11" in open court on April 29, 1980 and by Amended Order dated May 1, 1980.

APPENDIX D

February 27, 1980 Memorandum Decision on Motion for Contempt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH POWELL, et al.,

Plaintiffs,

-against-

BENJAMIN WARD, et al.,

Defendants.

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74 Civ. 4628 (CES0

MEMORANDUM DECISION

STEWART, District Judge:

Plaintiffs, inmates at the Bedford Hills Correctional Facility ("Bedford Hills") have moved for an order holding defendant Phyllis Curry, superintendent of Bedford Hills, in contempt for failing to comply with our Order issued on June 23, 1975.

Plaintiffs brought this action to enjoin the officials at Bedford Hills from enforcing prison disciplinary procedures unless and until they comply with the guidelines set forth by the Supreme Court in *Wolff v. McDonnell*, 413 U.S. 539 (1974).[1] We granted class certification on March 27,

1. In *Wolff v. McDonnell*, decided June 26, 1974, the Supreme Court held that prisoners subject to disciplinary proceedings must be accorded the following rights: advance written notice of charges to be given at least 24 hours before a hearing, a written statement by the factfinders of the evidence relied on and the reasons for the disciplinary action, the right to call witness-

1975, defining class to include "all persons who are now and who may be incarcerated in Bedford Hills Correctional Facility" and "who are or may be subject to Adjustment Committee Proceedings or Superintendent's Proceedings at the Institution."

Hearings were conducted, and we held that "any disciplinary proceedings which may result in placement in solitary confinement", which included Adjustment Committee Proceedings and Superintendent's Proceedings, must conform to the procedural requirements established by the Supreme Court in *Wolff v. McDonnell, supra.* We then found that defendants failed to provide inmates facing Adjustment Committee Proceedings with adequate notice, opportunity to call witnesses, explanation of the disposition, and statement of the evidence relied upon in reaching the disposition. There was also evidence showing that inmates were placed in segregation for as long as four weeks pending investigation of charges against them and that the official involved in an incident leading to a disciplinary proceeding or a subsequent investigation of that incident presided in some instances over the disciplinary proceedings.

Although some of the safeguards set forth in *Wolff v. McDonnell, supra,* were generally followed in the Superintendent's Proceedings, some of the procedures were never followed, such as providing inmates

es and present documentary evidence when doing so does not jeopardize institutional safety or correctional goals, and the right to counsel where the inmate is illiterate or where the issues are unusually complex. 418 U.S. at 563–67, 569–70, 94 S.Ct. 2963, at 2978–80, 2981, 41 L.Ed.2d 935.

with the right to call witnesses, and others were provided sporadically. *See Powell v. Ward*, 392 F.Supp. 628 (S.D.N.Y.1975). We concluded that injunctive relief was warranted, and entered a preliminary injunction on June 23, 1975, which was modified on appeal. *Powell v. Ward*, 542 F.2d 101 (2d Cir. 1976).[2]

In December of 1976 three members of the plaintiff class moved to hold the superintendent of Bedford Hills in contempt for failing to comply with the Court's Order. We ordered that the correctional and parole files of the three inmates be expunged of all reference to the incident giving rise to the contempt motion, awarded plaintiffs attorneys' fees, and noted that "this Court is concerned by indications that our prior order has not been fully complied with and we will consider future violations of the order as matters of utmost seriousness." *Powell v. Ward*, 74 Civ. 4628, June 24, 1977 (order).

In March of 1979 Carol Crooks, a member of the plaintiff class brought this motion to hold defendant Phyllis Curry in contempt and for other related relief. After a one day hearing, Crooks adjourned her motion and a contempt motion on behalf of the class was filed. Hearings were held in June

2. Defendants appealed only from the provisions of the order concerning the membership of the Adjustment Committee and Superintendent's Proceedings and the time an inmate may be held in segregation pending investigation. They did not challenge the order granting class certification or the applicability of the *Wolff* procedural requirements to the Adjustment Committee. *See Powell v. Ward*, 542 F.2d 101 (2d Cir. 1976).

of 1979, and the parties subsequently submitted proposed findings of fact and conclusions of law.

Class Certification

[1] Before determining whether the defendant has failed to comply with our order and if so whether her non-compliance constitutes contempt, we must address defendant's contention that the class action order is jurisdictionally defective insofar as it includes future inmates and future Adjustment Committee and/or Superintendent's Proceedings. Defendant's failure to challenge class certification in a timely manner constitutes sufficient grounds for rejecting defendants' claim, especially in light of the unfairness to the class which would result from decertifying the class at this time. We originally granted class certification on March 27, 1975. Defendants did not oppose certification at that time or during the trial and did not raise any such objection on appeal. Nor did defendants challenge the validity of the class at the first contempt hearing in 1977. We are reluctant to consider at this late date the threshold question of the validity of the class.

However, in light of the importance of the Article III requirements of existence of case or controversy, we have considered defendants' claim and find it to be without merit. Courts have approved certification of classes which include future members, *Robertson v. National Basketball Association*, 389 F.Supp. 867, 897 (S.D.N.Y.1975), especially in civil rights cases, where the members of the class are usually "incapable of specific enumeration." Advisory Note to

Rule 23. *See, e. g., Marcera v. Chinlund*, 595 F.2d 1231, 1940 (2d Cir. 1977); *Forts v. Malcolm*, 426 F.Supp. 464, 465 (S.D.N.Y. 1977); *Baird v. Lynch*, 390 F.Supp. 740 (W.D.Wis.1974); *Wallace v. McDonald*, 369 F.Supp. 180, 188 (S.D.N.Y.1973); *Inmates of Lycoming County Parish v. Strode*, 79 F.R.D. 228 (M.D.Pa.1978); *Tunin v. Ward*, 78 F.R.D. 59 (S.D.N.Y.1978). Any class consisting of the inmates confined at an institution is likely to include individuals who were not identifiable at the time the class was certified. In the prison context, where any action taken will affect future inmates and "the constant existence of a class of persons suffering the deprivation is certain", class certification including future members is appropriate. *Gerstein v. Pugh*, 420 U.S. 103, 110–11, n.11, 95 S.Ct. 854, 861 n.11, 43 L.Ed.2d 54 (1974); *Inmates of Lycoming County Prison v. Strode*, 79 F.R.D. at 231.[3]

Mathews v. Diaz, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), the case upon which the defendants base their argument, is not inconsistent with our decision upholding class certification. There, the Court

3. In cases where courts have denied class status to future members, they have been concerned primarily with the dangers of an amorphous, ill-defined class, such as unmanageability, difficulty of notifying class members and increased possibility of inadequate representation as to some class members. *See, e. g., Edwards v. Schlesinger*, 377 F.Supp. 1091 (D.D.C.1974).

These issues are not present here, where plaintiffs' counsel adequately represents the class and where the boundaries and location of the class are clear.

was concerned with the appropriateness of class certification in a case brought under the Social Security Act, which requires final agency action by the Secretary of HEW denying enrollment in a particular Medicare program before a federal court can exercise jurisdiction. *See* 42 U.S.C. § 405(g). The Supreme Court relied on the absence of such final agency action as a basis for holding that a class defined to include those who "will be denied enrollment" was too broad. 426 U.S. at 71, n.3, 96 S.Ct. at 1887, n.3. Those concerns are inapposite in the instant case, which is brought under 42 U.S.C. § 1983. Therefore, we decline to modify or vacate our class certification order.

Res Judicata as to Inmates Santana and Harris

Defendants argue that inmates Santana and Harris may not be heard on this motion because their "claims" were previously litigated in Article 78 proceedings. Prior to the institution of this contempt motion by the class, Janie Harris brought an Article 78 proceeding under N.Y.C.P.L.R. § 7801 challenging the validity of the determination of a Superintendent's Proceeding dated June 15, 1979 based on defendants' failure to permit her to call witnesses, to inform petitioner of the factual circumstances supporting the charge, to accurately inform her of the testimony of inmate witnesses, and to provide her with an impartial hearing officer, in violation of our order in *Powell v. Ward*. Her petition was denied. Inmate Luz Santana filed an Article 78 petition for relief from an adverse determination of a

Superintendent's Proceeding entered March 13, 1978. Her petition was granted based, *inter alia*, on defendants' failure to interview an employee and to inform the inmate of the factual circumstances supporting the charge, and the absence in the record of anything relating to the incident which allegedly occurred.

[2, 3] The precise nature of defendants' res judicata defense is not clear. Neither Harris nor Santana have filed individual claims in the instant case, and both are proceeding as members of the class. The class was not a party to the prior litigation, and it is well established that an adverse judgment cannot be asserted against a party unless there has been reasonable notice of the claim against him and an opportunity to be heard in opposition to that claim, as required by the due process clauses of the Constitution. *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972). Therefore, the class is not precluded from relitigating the issue of the adequacy of the procedural safeguards provided in Harris' Superintendent's Proceeding for purposes of determining whether defendants are in contempt of our order.

[4] We are particularly puzzled by the assertion of Santana's prior litigation as a defense to the instant motion, in light of the determination in the Article 78 proceeding that defendants failed to provide necessary procedural safeguards and Santana was therefore entitled to relief. If this judgment is to have any binding effect on the determination of defendant's compli-

ance with our order, it would be to estop the defendant from challenging the findings of the prior proceeding that defendants failed to notify Santana of the specific charges against her, to interview employees, to inform her of the factual circumstances supporting the charge or to give her a written disposition stating the basis for the decision. *Santana v. Superintendent, Bedford Hills Correctional Facility*, January 27, 1978 (Article 78 proceeding).[4] However, in the absence of any pleadings or motions by plaintiff invoking collateral estoppel as to Santana's proceedings, it is unnecessary to determine whether the defendant is bound by the determinations in that prior litigation.

[5] It remains to determine whether Santana and Harris are barred from class membership or from obtaining specific relief to the extent that their claims have already been litigated. We note that the issues before the state court only challenged the validity of two Superintendent's Proceedings and did not concern most of the facts at issue or the relief sought in this case. In any case, we find that the prior judgments do not affect Santana's or Har-

4. Collateral estoppel precludes relitigation of issues that were actually, fully and necessarily litigated in the prior proceeding. Restatement of Judgments § 70, comment (b) (1942); *Divine v. Commissioner of Internal Revenue*, 500 F.2d 1041 (2d Cir. 1974). The applicability of collateral estoppel here would depend on whether the Second Circuit's abrogation of the doctrine of mutuality were extended to this context. *See generally* 1B Moore's Federal Practice ¶ 0.412. It is unnecessary to reach that issue here.

ris' membership in the class or their entitlement to class relief. A class action brought under 23(b)(2) is specifically intended "to reach situations where a party has taken action or refused to take action with a class, and final relief of an injunctive nature . . . settling the legality of the behavior with respect to the class as a whole is appropriate." Committee Note of 1966 to Rule 23, 3B Moore's Federal Practice ¶ 23.01[10–2]. A prerequisite to granting class certification under 23(b)(2) in addition to the general requirements is that:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

F.R.Civ.P., Rule 23(b)(2). The class is to be treated as an entity, rather than as an aggregate of individuals. *See* O. Fiss. The Civil Rights Injunction (1978). There are no opt out provisions for 23(b)(2) class actions,[5] and in any case it would be difficult to exclude inmates from relief which is designed to affect the practices and procedures of the defendant.

The situation here is analogous to that in *Sledge v. J. P. Stevens Co., Inc.*, 585 F.2d 625 (4th Cir. 1978), where the court dismissed individual plaintiffs' claims of discrimination, but granted class relief for dis-

5. Even in 23(b)(3) actions, for which there are opt out provisions for potential class members, the previous institution of an independent action does not automatically exclude membership in the class. *See Supermarkets General Corp. v. Grinnel Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973).

crimination. There, the court held that "the judgment of dismissal did not strip [the individuals] of any class membership, and to the extent that they would personally benefit, directly or indirectly, from any of the other remedies ordered by the district court, they have not been denied such benefits." *Id.* at 637.

The prior litigation may affect Harris' and Santana's entitlement to individual relief, such as expungement of records or damages. Although there is some confusion concerning the standard for determining whether res judicata bars subsequent relief in civil rights cases, *see Winters v. Lavine*, 574 F.2d 46, 55 (2d Cir. 1978), in the most recent case dealing with this issue, the Court of Appeals held that "where a constitutional issue has been actually raised in the state court, the litigant has made his forum choice and may not relitigate that issue in federal court." *Ornstein v. Regan*, 574 F.2d 115, 117 (2d Cir. 1978). To determine whether a constitutional issue was actually litigated, the Court considered the extent to which the pleadings and the lower court opinion referred to constitutional issues and the scope of jurisdiction of the state forum. *Id.*

Santana's Article 78 proceeding concerned whether her Superintendent's Proceeding was conducted in accordance with 7 N.Y.C.R.R. Part 253. There was no mention of violations of constitutional due process or *Powell v. Ward*. Therefore, she did not actually litigate the constitutional issues now before us, and she is not barred from individual relief such as damages should such relief be found to be warranted

Harris did litigate the constitutional issues in her Article 78 proceeding. She based her claims for relief squarely on the order in *Powell v. Ward.* Unless it is determined that the limited scope of jurisdiction of Article 78 proceedings precludes the application of res judicata,[6] Harris is precluded from relitigating the issue of her entitlement to individual relief for violations pertaining to the Superintendent's Proceeding challenged at the Article 78 proceeding. The Article 78 court had jurisdiction to provide the individual relief Harris sought. Therefore, we cannot hold that her claim was not actually and fully litigated there, and Harris is barred from relitigating her entitlement to relief concerning the Superintendent's Proceeding challenged in the Article 78 proceeding.

Defendant's Compliance with the Court Order

The issue before us concerns the extent to which the defendant has complied with our order requiring conformance to the procedural requirements set forth in *Wolff v. McDonnell, supra,* and embodied in our order. Based on the testimony and documents submitted at the hearings and depositions conducted in June of 1979, the affidavits submitted by the parties and all other material on the record concerning this

6. Article 78 proceedings can provide relief if it is determined that "a determination has been made in violation of a lawful procedure " or was "an abuse of discretion, including abuse of discretion as to the nature or mode of discipline imposed."

issue, we make the following findings:[7]

Adjustment Committee

[6] The introductory section of paragraph 1 of the order states that:

> Defendants shall conduct all Adjustment Committee or Superintendent's Proceedings, or other disciplinary proceedings that may result in an inmate at Bedford Hills Correctional Facility being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures. . . .

Defendant Curry contends that this paragraph does not require procedural safeguards to be instituted in Adjustment Committee Proceedings, and has indicated that the administration at Bedford Hills treated the order as applying solely to Superintendent's Proceedings, tr. at 356, 365, 644. Defendant's position, which reads "Adjustment Committee" out of the order, is based at best on a strained interpretation of the last phrase of the introductory paragraph. The argument is that, because that last phrase refers only to proceedings resulting in confinement to Special Housing Unit or segregation, that phrase qualifies the scope of the order requiring procedural safeguards at Adjustment Committee Proceedings. Specifically, defendant argues that the safeguards are not applicable to proceedings that might result in keeplock, which is twenty-four hours a day confinement in one's cell, often without privileges or exercise, tr. at 12, 49, 52, 122. Also, defendant argues, the Adjustment Commit-

7. These findings shall be considered findings of facts and conclusions of law, in accordance with Rule 52(a), F.R.Civ.P.

tee is not authorized to sentence an inmate to the Special Housing Unit as a disposition in a case. True, defendant concedes, following an Adjustment Committee Proceeding an inmate may be detained in the Special Housing Unit for a period of time pending a Superintendent's Proceeding. But the defendant suggests that, because the officer on the floor, not the Adjustment Committee, initially placed the inmate in segregation and only the Superintendent's Proceeding can ultimately sentence the inmate to the Special Housing Unit, the Adjustment Committee's decision to continue an inmate's detention in Special Housing for as long as sixteen days does not fall within the terms of the order, tr. at 17–18. The defendant concludes that, because the Adjustment Committee Proceedings never result in such confinement as a disposition and the order does not apply to keeplock, the order does not apply to Adjustment Committee Proceedings.

This complicated and somewhat tortured presentation of the meaning of our order does not in any way alter our long-standing view that the order unequivocally applies to Adjustment Committee Proceedings. The language of the order is clear and unqualified. Moreover, the findings of fact and conclusions of law which were issued prior to the order specifically enjoined the use of Adjustment Committee Proceedings unless and until due process safeguards were instituted. *Powell v. Ward*, 392 F.Supp. 628, 631 (S.D.N.Y.1975). Defendants never requested a modification or clarification of the scope of the order, nor was this issue raised on appeal. We are inclined to view

defendant's grammatical gymnastics as an attempt to circumvent the impact of the order.

Furthermore, defendant's arguments ignore the fundamental concern underlying our decision in this case, namely, that the substantial deprivation resulting from solitary confinement of an inmate be based on a fair impartial hearing. 392 F.Supp. at 629. The language relied on by the defendant to limit the scope of the order was intended to insure that *all* proceedings that may result in solitary confinement were within the scope of the order. The testimony of prison officials and inmates alike indicated that keeplock is the equivalent of solitary confinement, tr. at 316. Indeed, keeplock is sometimes even more restrictive than confinement in the Special Housing Unit, when shower, exercise and other basic privileges are removed. Tr. at 49. Thus, keeplock is clearly included in the language and spirit of the order.[8]

8. This result is not contrary to recent authority concerning the question of the applicability of *Wolff v. McDonnell, supra*, notwithstanding changes in the regulations concerning the punishments the Adjustment Committee is empowered to impose. In *McKinnon v. Patterson*, the Court of Appeals held that keeplock for a period of up to 2 weeks was a substantial deprivation and left open the issue of whether 1 week in keeplock would and of itself constitute a substantial deprivation under the 14th Amendment. 568 F.2d 930, 938 (2d Cir. 1977). Subsequently, the state modified its regulations so that the maximum period of keeplock that could be imposed was one week, 7 NYCRR § 304(1)(d). In our view, the possibility that the Adjustment Committee can impose one week of keeplock or detain an inmate in the Special Housing Unit pending a determination

We are equally unpersuaded by the argument that the Adjustment Committee cannot sentence an inmate to the Special Housing Unit. Defendant Curry overlooks the important consideration that inmates have spent as long as sixteen days in solitary confinement awaiting a Superintendent's Hearing. A fair hearing after the fact does not detract from the deprivation the inmate has already suffered. Even though the Adjustment Committee does not sentence the inmate, it makes a decision, based on the information presented to it at the hearing, that continued confinement is warranted. Due process requires that, if such a substantial deprivation is to be imposed on an inmate, a hearing conforming to the procedural requirements established in *Wolff v. McDonnell, supra*, is necessary.[9]

of the Superintendent's Proceeding warrants the application of *Wolff v. McDonnell*, to Adjustment Committee Proceedings. *See McKinnon v. Patterson, supra* at 938; *Powell v. Ward*, 542 F.2d 101 (2d Cir. 1976); *Crooks v. Warne*, 516 F.2d 837 (2d Cir. 1975); *United States ex rel. Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975).

9. Furthermore, if the Adjustment Committee recommends that a Superintendent's Proceeding be held, a procedure that is required when an inmate is confined in the special housing unit, the reports and records of the Adjustment Committee are deemed "incorporated into the record of the [Superintendent's] Proceeding and may be considered by the person conducting the proceeding without the necessity of formally reading same into the record." 7 NYCRR § 253.4(d). This possibility that the Adjustment Committee Proceedings could be used in the Superintendent's Proceeding as a basis for the imposition of a substantial period of isolation provides further support for the necessity of providing *Wolff v. McDonnell* safeguards for the Adjustment Committee.

Thus it is clear from both the language and spirit of our order that it applies to Adjustment Committee Proceedings. It must now be determined to what extent the proceedings currently employed at Bedford Hills comply with our order.

Notice

[7] Paragraph 1(a) of the order provides that:

> Formal written notice of charges must be served on the inmate at least 24 hours before the hearing.

For Adjustment Committee Proceedings, the defendant's current policy is to provide inmates with a Notice of Report. This form indicates the inmate's name and status, a code number of the offense with which the inmate is charged, the location, time and date of the incident, and the signature of the investigating officer. (Exhibit E.) The offense indicated by the code number is not included on the form. To find out the offense category referred to by the code number, the inmate must refer to the "Standards of Inmate Behavior" rule book, which is not always readily available to inmates. Tr. at 163, 399, 546. Once she obtains a copy of the rule book, the inmate is not necessarily much better informed of the nature of the charges against her. The prohibited behavior to which the code number refers is often general and ambiguous. For example, 1.25 is "disturbance, creation, participation, or inciting others to participate (threat to security or order); 3.00 is "any violation of posted and distributed local facility rules or procedures." A particularly troubling example of the generality of the code numbers is 1.90—"refusing to

obey a direct order." The inmate may have no knowledge of which order is involved.

These categorical definitions of inmate offenses do not satisfy the notice requirement set forth in *Wolff* and embodied in our order. The purpose of the notice requirements is to inform the inmate of the charges and enable her to marshall the facts and prepare a defense. *Wolff v. McDonnell, supra*, 418 U.S. at 564, 94 S.Ct. at 2978. An inmate gains little insight into the nature of the charges and factual allegations against her from knowledge of the offense category with which she is charged. One prison official testified that different officers may interpret the rules differently, so that the inmate is not always sure of the nature of the charges against her, tr. at 58–60. If an inmate is unable to obtain access to an inmate rule book, it is possible that she would have no knowledge of the nature of the charges against her until the proceeding itself. To rely on the inmate's knowledge of the incident in which she was involved as the basis for adequate notice, as suggested by the defendant, tr. at 402, would severely undercut the constitutionally mandated principle of due process on which the notice requirement is based. *See Wolff v. McDonnell*, 418 U.S. at 572, 94 S.Ct. at 2982. Therefore, we find that the form of notice currently provided to inmates facing Adjustment Committee Proceedings does not comply with the notice requirements of the order.

There was also some testimony indicating that inmates do not always receive the notice of hearing twenty-four hours in advance. As a general practice, inmates are

provided with the notice of report at least twenty-four hours in advance, but several inmates testified that they did not receive notice until the hearing began, tr. at 105, 165, 177–78, and there was testimony indicating that, on occasion, an additional charge was added at the hearing, without prior notice to the inmate, tr. at 178. However, in light of the inadequacy of the notice actually provided, the inmates due process rights have not been significantly altered by the timing of the notice.

The established procedure for notifying inmates facing Superintendent's Proceedings of the charges against them is to provide a Superintendent's Proceeding Formal Charge at least twenty-four hours before the hearings is scheduled. This form notifies the inmate that a charge has been filed and a Superintendent's proceeding has been scheduled, furnishes the name and title of the official who will preside, and provides a space in which to state the code number and category of the charge and specify the factual basis for that charge. The evidence presented indicates that the inmates are generally provided with sufficiently detailed notice to satisfy the requirements of the order. The officer involved generally includes a factual description of the incident leading to the charges. *See, e.g.*, Exhibit HHHHH. There was evidence, however, that on several occasions defendant failed to provide any notice, or that the terms of the notice provided were so vague and ambiguous that the inmate would not reasonably be expected to ascertain the conduct at issue. *See, e.g.*, tr. at 132. Notice to Luz Santana, Exhibit T (inmate charged with "planning to start something in the yard" and

"meeting attorneys to participate in whatever").

Similarly, although the defendant, as a general matter, does provide notice at least 24 hours before the proceeding, there were instances where charges were added at the hearing, or where the inmate did not receive formal charges until the hearing. *See* dep. tr. at 52; testimony of Anderson at 50; Harris tr. at 234.

Witnesses

Paragraph 1(b) provides that:

> The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of charges served in accordance with paragraph 1(c) shall inform the inmate of her right to call witnesses.

It is undisputed that inmates are not permitted to call witnesses to testify in their presence at a hearing. Tr. at 433 and 570. Inmates facing Superintendent's Proceedings have the right to request the Hearing Officer to interview witnesses outside the presence of the inmate. Tr. at 412–413. The interviews with inmates are tape recorded, but not transcribed. Inmates requesting witnesses are not permitted to hear the tape, tr. at 571. The general policy is to inform inmates of their right to request that witnesses be interviewed by typing the following statement on the Formal Charge: "The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals." Plaintiff's Exhibit 15.

The evidence presented at the hearing shows that the practice has deviated somewhat from the policy just described. In a number of instances, the formal charge failed to inform the inmate of the right to call witnesses, *see, e. g.* tr. at 53, Exhibits 10, 24, 27, 45, UUUU, and several inmates testified that they were never notified of that right. *See, e. g.* tr. at 42, 102, 199. The Deputy Superintendent for Security testified that a request for witnesses was never denied on the basis that the testifying inmate would jeopardize institutional security or correctional goals. Tr. at 603. Witness interviews appear to have been denied because the inmate pleaded guilty to the charges, tr. at 631, and because the interviews were determined to be unnecessary, irrelevant or cumulative, tr. at 103, 431, 631. One inmate testified that she was asked to select the most pertinent witness, and only that one would be interviewed, tr. at 574, 604, 632; Exhibits 37 and 38.

The policy and practice regarding witnesses in Adjustment Committee Proceedings reflects defendants' erroneous assumption that our order does not apply to Adjustment Committee Proceedings. The Superintendent testified that inmates do not have the right to call witnesses at Adjustment Committee Proceedings, tr. at 433. Not surprisingly, the notice of hearing does not inform witnesses of this right. Several inmates testified that they did not know that they could call witnesses for Adjustment Committee Proceedings, tr. at 31, 162, 251. It is unclear from the record whether defendants have interviewed witnesses in the event an inmate facing Adjustment

Committee Proceedings does make a request.

There is no question that the failure to notify inmates that they may call witnesses to testify in their behalf is a clear violation of our order. To the extent that the defendant has denied any witnesses in Adjustment Committee Proceedings, these actions also constitute non-compliance.

Plaintiffs also contend that defendants' refusal to allow witnesses to testify at the hearing in the presence of the inmate constitutes a violation of our order. Defendants argue that the order requires only that witnesses be interviewed. The current policy is to interview witnesses outside the presence of the inmate. The interviews are tape recorded. There was testimony indicating that the tape recorder is turned on and off during the hearing. We are also troubled by evidence that the witness is cross-examined, rather than questioned. Tr. at 44, 81. Inmates do not normally receive transcripts of the hearing, nor are they permitted to hear the tape. Tr. at 48. The interview is not incorporated into the record of the hearing.

The issue of whether the order requires witnesses' presence at hearings has caused some confusion on prior occasions. *See Powell v. Ward*, Memorandum Decision, April 9, 1975. Before we can determine whether the current practice satisfies the requirements of our order, it is necessary to clarify the meaning of the provision concerning the right to call witnesses.[10] In

10. In light of the uncertainty surrounding this aspect of the order, any related finding of non-compliance will not be consideration as a basis for contempt.

Wolff v. McDonnell, supra, the Supreme Court held that

> "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. . . . [h]ere we must balance the inmate's interest in avoiding loss [of good time] against the needs of the prison, and some amount of flexibility and accommodation is required."

Wolff v. McDonnell, 418 U.S. at 566, 94 S.Ct. at 2679.

We are not persuaded that *Wolff* supports a blanket policy against allowing witnesses to be present at the hearing. The Court appears to have contemplated individualized determinations of the potential threat to security created by the presence of the inmate at the interview. True, prison administrators are to be given broad discretion in determining whether such a threat exists. *Wolff* at 566, 94 S.Ct. at 2979. But administrative necessity does not require a blanket rule which precludes the presence of witnesses when there are no countervailing concerns warranting that prohibition. Requiring prison officials to determine on an individual basis whether

witnesses can be present encourages them to exercise their discretion to strike the appropriate balance between the prisoner's right to call witnesses and the prison's need to maintain order.

This determination takes on added significance when considered in conjunction with the policy at Bedford Hills concerning investigations. If an inmate requests that witnesses be interviewed, her disciplinary proceeding is adjourned until those interviews have been completed. Inmates held in segregation pending the outcome of the hearing, have been held in segregation for as long as sixteen days while their witnesses are interviewed. By allowing witnesses to appear at the hearing in appropriate situations to be determined by the prison officials according to their discretion, the hearing process is likely to be expedited.

When it is determined that possible hazards to institutional safety or correctional goals preclude a witness' presence at the hearing, the prison officials may interview her out of the presence of the inmate. However to enable the inmate to present a defense, she should, under ordinary circumstances, be permitted to listen to the tape or read the transcript, unless the prison officials determine that this would also jeopardize institutional safety or correctional goals. One inmate, Robin Anderson, didn't even know whether requested witnesses had been interviewed. Tr. at 43. This procedure would also reduce the possibility of inaccuracies in the description of witness' testimony to inmates, a problem which arose in a disciplinary proceeding involving Carol Crooks. *See* Exhibit P.

In sum, to comply with section 1(b), witnesses must be allowed to be present at disciplinary proceedings, unless the appropriate officials determine that this would jeopardize institutional safety or correctional goals.[11] If an inmate is not permitted to have witnesses present, the interview may be conducted out of her presence and tape recorded. The tape or transcript of the interview, which is to be considered part of the record of the hearing, is to be made available to the inmate prior to or at the hearing, unless prison officials determine that this too would jeopardize institutional safety or correctional goals. In either case, a written explanation of the denial of witnesses is to be given to the inmate.

Plaintiffs also argue that defendant violated our order by limiting the number of witnesses to be interviewed. There was testimony that prison officials had, on occasion, denied all of an inmate's requests for witnesses, or required an inmate to select the most pertinent witness, tr. at 574–75. These decisions do not fall within the exception in the order to the requirement that inmates be permitted to call witnesses to testify in their behalf, and no other justification for denying witnesses was provided. Contrary to plaintiffs' contention, this does not mean that prison officials may not limit the number of witnesses to be called under any circumstances. If an inmate requests an unreasonable number of witnesses, and

11. The Department of Corrections and the former superintendent of Bedford Hills interpreted our order and *Wolff* to require the presence of witnesses. *See* Exhibits 21 and 24.

prison officials determine that some of these witnesses are cumulative, witnesses may be excluded on that ground. Witnesses may also be excluded if the hearing officer determines that their involvement will jeopardize institutional safety or correctional goals.

Written Explanation of Denial of Request for Witnesses

Section 1(c) of the order provides

> If permission to call a witness is denied, the party conducting the hearing shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented by the witness.

It was not disputed that statements of the reasons for denying requests for witnesses have not been given to inmates, tr. at 603. One prison official testified that they did not believe the written statement was necessary because witnesses had never been denied on the grounds that they presented a threat to institutional safety or correctional goals. Contrary to defendant's contention, the requirement of a written statement is not restricted to denials based on institutional safety or correctional goals, but requires a written statement whenever a request for witnesses is denied. Defendant's failure to give inmates written statements of reasons for the denial of witnesses is another instance of non-compliance with our order.

Written Statement of Evidence and Reasons for Disposition

Section 1(d) of the order states:

At the conclusion of the hearing, the inmate shall be given a written statement of the evidence relied on and the reasons for any action taken.

Inmates are not given any written disposition after an Adjustment Committee Proceeding, tr. at 31, 106, 168, 252, 464. The current practice is to inform the inmate orally of the discipline imposed and to forward a written report of the charges and the decision to the Deputy Superintendent of Security and the prison service unit for inclusion in the inmate's files. This procedure does not satisfy Section 1(d) of the order.

The general practice in Superintendent's Proceedings is to provide inmates with a Superintendent's Hearing Statement of Evidence and Reason for Disposition. When the presiding official properly completes the form and gives it to the inmate at the completion of the hearing, this procedure complies with Section 1(d) of the order. On at least some occasions, however, inmates have not received this statement at all, or have received them well after the hearing was terminated, tr. at 35, 57 and 272. For instance, Luz Santana stated that she had not received any written dispositions after three separate Superintendent's Proceedings, and Robin Anderson received her written statement four months after the hearing, after several requests.

The completed statements of evidence relied upon submitted to the Court by both parties indicate that the forms themselves are inadequately completed. As plaintiffs point out, the statement of evidence relied

upon most often consists of a list of the source of the information presented to the hearing board. For example, one statement lists as evidence relied upon "misbehavior reports, discussion at Superintendent's Proceeding. Interview with Sgt. Pompellone re: charges and information re: C. O. Young and inmate Robin Anderson." Another statement merely says "reports from C. O. Stephen and C. O. Young." This information does not "protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding." *Wolff v. McDonnell*, 418 U.S. at 565, 94 S.Ct. at 2979. Nor is the inmate likely to be aided in "propounding his own cause or defending himself to others," *id.*, especially because the inmate does not have access to some of the reports upon which the decision may be based.

Some of the statements of the reason for the disposition also fail to adequately inform the inmate and other decision makers who may rely on this information of the basis of the decision, although hearing officers were more thorough in providing this information than the statements of evidence. In some instances, however, the hearing officer merely restated the offense the inmate was found to have committed. *See, e. g.* Exhibit 12, p. 5; Exhibit JJJ; Exhibit 39.

The Department of Corrections aptly set forth the degree of specificity necessary to comply with our order:

> In order to comply with *Powell v. Ward*, it will be necessary to detail the evidence. Evidence can basically be described as the

> facts which tend to prove or disprove the charges presented. Furthermore, it will be necessary to give the reasons for the action taken (disposition). In other words, the rationale for a particular restriction, confinement, or other penalty being imposed [sic].

Exhibits 23 and 24, Memo. As of now, the responsible officials have not consistently met this standard.

Membership of the Hearing Committee

Section 1(e) of the order provides:

> No person who has participated in any investigation of the acts complained of, or who was a witness to those acts shall be a member of any Adjustment Committee or Superintendent's Proceeding relating to those acts.

On occasion, officers who were involved in the incident underlying the charge were also a member of the disciplinary board in that case. For example, Carol Crooks testified that the officer presiding over her hearing of December 20, 1977 was involved in the relevant incident, tr. at 650. On the basis of the record, it is difficult to assess the degree of such non-compliance. We note that the policy that the Adjustment Committee investigates any incident that comes before them, 7 NYCRR § 253.4; tr. at 569, is likely to increase the likelihood that an involved official will preside over a related disciplinary proceeding.

There is a more general problem with the current policy of allowing members of the Adjustment Committee or Superintendent's Hearing to investigate the incident, a policy

which is embodied in the department's regulations. *See* 7 NYCRR § 253.3, 253.4; tr. at 569. There was testimony that the person who assists the inmate at the hearing is authorized to conduct the investigation as well. Whether or not these people actually performed that function, the evidence establishes that the hearing officers do conduct investigations. This procedure is in direct conflict with Section 1(e) of the order.

Nor is this problem of non-compliance remedied by the procedure adopted by the defendants, apparently to avoid changing their policy, of postponing the investigation until after the hearing is commenced, tr. at 465, Exhibit 30.[12] Our concern in issuing this provision was that the hearing officer remain impartial, *Holfield v. Power Chemical Company, Inc.*, 382 F.Supp. 388, at 392. The formality of convening and adjourning the disciplinary proceedings does not diminish the possibility that an investigation of the incident by the hearing officer may affect his or her neutrality in rendering a disposition.

We do not as a matter of general principle, consider interviews of witnesses requested by an inmate conducted out of her presence and tape-recorded to constitute investigations within the meaning of our order. These interviews would ordinarily be conducted by the hearing officer at the

12. This practice has resulted in problems relating to the defendant's compliance with the requirement of a hearing within seven days of confinement. Inmates have been confined for substantial periods "pending investigation" of the requested witnesses.

proceeding. It was reasonable under the circumstances for the prison officials to treat witness interviews as part of the hearing, and to the extent that current practices create the possibility of bias or unfairness, these problems are more appropriately addressed in the section dealing with the inmate's right to call witnesses in her behalf.

Hearing Within Seven Days of Confinement

Section 2 of the order as modified by the Court of Appeals provides:

> If any inmate is confined to Special Housing or Segregation "pending investigation" of charges, a hearing must be held within seven days of the date of her confinement. In unusual or emergency situations, the seven-day requirement may be extended but only with the permission of the Commission of Correctional Services or his designee.

Adjustment Committee Proceedings and Superintendent's Proceedings are generally commenced within seven days of the inmate's confinement, although there were isolated instances in which the hearing was opened later. For example, Robin Anderson's Superintendent's Proceeding was initiated a day late, tr. 625, Exhibits SS and TT.

However, a serious problem concerning confinement "pending investigation" remains. In a number of instances, the hearings were not completed within seven days of confinement. For example, Robin Anderson was confined for 13 days and then acquitted of the charges; another inmate was in SHU for 16 days before a disposition

was rendered, tr. at 264; Luz Santana was confined for 15 or 16 days before a disposition was rendered, tr. at 519. *See* Exhibit 44. In none of these cases did prison officials obtain the permission of the Commissioner based on the existence of exigent circumstances.

Defendant argues that our order requires only that the hearing be opened within seven days. We do not agree. We originally found in *Powell v. Ward* that inmates were being confined "pending investigation" for significant periods of time. As we stated earlier, the fact that a hearing is convened and adjourned "pending investigation" does not alter the pivotal fact that inmates are subject to confinement for substantial periods before any determination is made that such confinement is required. The order, as modified, provides prison officials with the flexibility necessary to deal with unusual or emergency situations, and still protects inmates' due process rights. It becomes particularly important to ensure swift disposition of cases where the inmate has been confined pending a determination in light of the practice at Bedford Hills of fairly routinely confining inmates following incidents leading to disciplinary proceedings.[13]

Therefore, we find that defendant's failure to complete proceedings within 7 days of the inmate's confinement constitutes a violation of Section 3 of the order.

13. We recognize that prison officials may confine inmates without a hearing when the inmate is violent or otherwise threaten institutional security, as long as a hearing follows as soon as practicable. *See McKinnon v. Patterson*, 568 F.2d at 939 n.10.

Failure to Provide Interpreters for Spanish Speaking Inmates

[8] Plaintiffs contend that the defendant's failure to provide Spanish speaking inmates with notice and statements in Spanish violates Sections 1(a) and 1(d) of the order. It was not disputed that notice and statements are given only in English, tr. at 463–64. Several inmates testified that they did not speak or understand English, and that they could not understand the notice or statements given to them, nor could they understand fully what went on at the hearing, tr. at 130–134.

Although prison officials' responsibility to provide comprehensible notice to Spanish speaking inmates was not dealt with directly by the Supreme Court in *Wolff v. McDonnell, supra*, the Court's treatment of illiterate inmates is instructive. The Court required prison officials to provide an opportunity for aid to such inmates in understanding the written communications and aiding her at the hearing, 418 U.S. at 570, 94 S.Ct. at 2981. The emphasis was on enabling the inmate to comprehend the case so that she is able to collect and present evidence. These considerations are equally pressing in the situation currently before us. Unless Spanish speaking inmates understand and can communicate with the hearing board, they are being denied the due process protections guaranteed in *Wolff*. Therefore, we find that due process requires that Spanish speaking inmates who cannot read and understand English must be given notice and statements in Spanish

or provided with a translator, who should be present at the hearing in any case.[14]

Accordingly, we find that defendant has failed to comply with our order requiring the institution of procedural safeguards in all disciplinary proceedings that may result in confinement of an inmate in segregation.

Contempt

Plaintiffs have moved for a finding of civil and criminal contempt for failure to comply with the order.

[9–11] "Broadly speaking, a civil contempt is a failure of a litigant to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein." *Walling v. Crane*, 158 F.2d 80, 83 (5th Cir. 1946). "While a finding of civil contempt should follow only from 'clear and convincing proof', *NLRB v. Local 282, International Brotherhood of Teamsters*, 428 F.2d 994, 1001–02 (2d Cir. 1970); . . ., the violation need not be wilful to evoke such a remedial determination. *NLRB v. Local 282, supra* at 1001;" *Aspira of N.Y. v. Board of Education of City of New York*, 423 F.Supp. 647, 653–54 (S.D.N.Y.1976). The relevant question has been determined to be "whether defendants have been reasonably diligent and energetic in attempting to accomplish what was ordered." *Aspira*, 423 F.Supp. at 654, citing cases. Inability to comply, if shown clearly and categorically by defendants, is a valid defense to a civil contempt motion. *United*

14. In light of the fact that this requirement has not before been articulated, we do not consider defendant's non-compliance as support for the contempt motion.

States v. Bryan, 339 U.S. 323, 330–34, 70 S.Ct. 724, 94 L.Ed. 884 (1950). However, "where the court determines that 'defendants violated their obligations under the decree by failures of diligence, effective control, and steadfast purpose to effectuate the prescribed goals,' contempt findings are in order." *Palmigiano v. Garrahy*, 448 F.Supp. 659, 670 (D.R.I.1978), *citing Aspira*, 423 F.Supp. at 651. In such cases, a finding of civil contempt is necessary "to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled." *Palmigiano v. Garrahy*, 448 F.Supp. at 670, *citing In re Nevitt*, 117 F. 448, 458 (8th Cir. 1902).

[12, 13] A finding of criminal contempt is punitive rather than remedial in nature, and is intended "to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders." *In re Nevitt*, 117 F. at 458. The Court, the U.S. Attorney or an attorney appointed by the Court for this purpose, may prosecute a criminal contempt motion. F.R.Crim.P., Rule 42(b). "Wilfulness . . . is an element of criminal contempt and must be proved beyond a reasonable doubt. *United States v. Greyhound Corp.*, 508 F.2d 529, 531 (7th Cir. 1974). There must be shown to be "a volitional act done by one who knows or who should reasonably be aware that his conduct is wrongful." *Id.* at 531–32.

In the case before us, we are concerned first and foremost with achieving and maintaining disciplinary proceedings which are

in accordance with the constitution. Continued non-compliance prolongs the harm to inmates caused by deprivation of fundamental rights without due process of law. We have found that the defendant has failed to comply in significant respects with virtually every provision of our order. This is not the first time it was necessary to hold that the procedures employed at Bedford Hills did not comply with our order. We are troubled by the defendant's lack of diligence and commitment in taking the steps necessary to achieve compliance.

The defendant's treatment of the court order as it applies to Adjustment Committee Proceedings is the most obvious and disturbing instance of the defendant's lack of reasonable diligence. The original opinion explicitly addresses and resolves the question of the applicability of our order to Adjustment Committee Proceedings. The accompanying order unambiguously applies to Adjustment Committee Proceedings. There was no appeal from the provision, nor was there any request for reconsideration or modification. The defendant determined, apparently unilaterally and in the face of contrary views of her predecessors and superiors, that the language and spirit of the order could be ignored. This action strongly influences our view that the defendant was not reasonably diligent in complying or even attempting to comply with our order.

This determination is further evidenced by the defendant's response to the provisions of the order requiring an impartial hearing officer and a hearing within 7 days of confinement. The interpretations pro-

posed by the defendant strain both the language and intent of the order. We are left with the impression that, rather than making all reasonable efforts to afford inmates the required due process protections, the defendant instituted superficial changes in policy that cut off consideration of the necessity of altering basic practices to comply with the letter and spirit of the order.

Our view is not altered by the fact that Superintendent Curry "consulted with her attorney", "searched for relevant material," and "called a staff meeting with her three Deputy Superintendents", at which the Superintendent went over the Order "point by point". The most troubling areas of noncompliance stem not from failure of staff to comply with valid procedures, but from those procedures adopted by the defendant that contravene the provisions of the order. Furthermore, although the defendant's efforts certainly indicate that she was concerned about the possibility of non-compliance, these efforts do not satisfy her responsibilities "to marshall [available resources], assert [her] high authority, and demand the results needed from subordinate persons . . . in order to effectuate the course of action required by the [order]." *Aspira*, 423 F.Supp. at 654. Her responsibility did not end with the delegation of duties, nor was it sufficient to follow up "by reviewing the papers in Superintendent's Proceedings to the extent she had time available." Defendants' Memorandum of Law at 30.[15] More active involvement

15. There was reason for concern because memoranda in defendant's files from the Departmental Review Board indicated that current practice did not conform to our order. *See* Exhibits 21, 23, 24, 25.

and supervision was and is necessary to bring about a change in procedures that are basic to the prison routine.

[14] We are also disturbed by the defendant's apparent ignorance of the existence of our order until September 1978.* Although Superintendent Curry was not personally involved in defendants' compliance efforts from the outset, the Superintendent at Bedford Hills assumed responsibility for achieving compliance with our order from the time the order was entered. We do not question Superintendent Curry's good faith, but the inevitable succession of officials in public office does not excuse non-compliance. *See Palmigiano v. Garrahy*, 448 F.Supp. at 673.

This is not a case in which the defendant has demonstrated inability to comply with our order. Bedford Hills had a pre-existing duty to institute many of the procedures required by our order. There was no showing of undue hardship or inadequate resources to comply with the order.

[15] For these reasons, we are forced to conclude that the defendant was not "reasonably diligent" in attempting to comply with the June 23, 1975 order. We decline to find that defendant's non-compliance was wilful, and we do not intend to punish the defendant for her failure to achieve compliance. Our finding of civil contempt is solely remedial in purpose. Defendant's failure to maintain minimum procedural safeguards in the face of a court order not only

* Phyllis Curry assumed the position of Superintendent at Bedford Hills in December, 1977.

deprives plaintiffs of their constitutional rights, but is also likely to contribute to their sense of the arbitrariness of disciplinary proceedings which due process safeguards are intended to reduce. We therefore conclude that a sanction and related relief is necessary.

The Remedy

[16, 17] "Generally, the sanctions imposed after a finding of civil contempt serve two functions: to coerce future compliance and to remedy past noncompliance. *See generally United States v. United Mine Workers*, 330 U.S. 258, 302–04, 67 S.Ct. 677, 91 L.Ed. 884 (1947). . . . . So far as the first of these functions is concerned, the district judge sitting in equity is vested with wide discretion in fashioning a remedy." *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). In assessing the appropriate character of the remedy, we "must then consider the character and magnitude of the harm threatened, and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers*, 330 U.S. at 304, 67 S.Ct. at 701.

[18] We have already discussed the irreparable harm caused plaintiffs by the continuing deprivation of their constitutional rights. It is almost five years since the order was first issued, and the due process violations that were enjoined at that time are still widespread. We conclude that a fine is necessary to demonstrate to the defendants the seriousness with which we view their continued non-compliance and to

generate the effort necessary to bring about prompt and meaningful compliance with our order and the Constitution. We will therefore impose on defendant Curry in her capacity as Superintendent of Bedford Hills Correctional Facility a fine of 5,000 dollars to be paid one month from the date of entry of our order, and 1,000 dollars thereafter for every additional day that the defendant is not in substantial compliance. The contempt finding may be purged if defendant achieves compliance with our order within that 30-day period. In that event, the Court may quash the contempt citation and revoke the fine. *Palmigiano v. Garrahy*, 448 F.Supp. at 672; *Hamilton v. Love*, D.C., 358 F.Supp. 338, 348; 361 F.Supp. 1235 (D.Ark.1973).

[19] Defendant's ignorance of the existence of the order until September of 1978 and apparent lack of concern for the actual state of compliance efforts over the last few years leads us to conclude that the appointment of a special master is warranted to oversee the compliance process and to report to the Court on a periodic basis concerning defendant's progress. Courts have inherent authority to appoint nonjudicial officers to aid in carrying out their judicial functions. *See Ex Parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1919). In addition, Rule 53, F.R.Civ.P., establishes a statutory basis for the appointment of a master. Masters have been used in the prison context, when prison officials were unable or unwilling to comply with a court order, to provide expert assistance, to serve as a visible reminder of the court's jurisdiction, and to serve as "the eyes and ears of

the Court." *Palmigiano v. Garrahy*, 443 F.Supp. 956, 986 (D.R.I.1977); *see also Jordan v. Wolke*, 75 F.R.D. 696 (E.D.Wis.1977); *Jones v. Wittenberg*, 73 F.R.D. 82, 85 (N.D. Ohio 1976). We think that compliance efforts here will be expedited by the appointment of a master to monitor compliance until we are satisfied that the due process protections required by our order have been incorporated into the prison routine. Therefore, the parties are to include in the proposed order to be submitted hereunder provisions specifying the duties and powers of the master.

[20] The imposition of the fine and appointment of the master serve the function of achieving future compliance. It remains "to make reparation to the injured party and restore the parties to the position they would have held had the injunction been obeyed." *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d at 130. "The court 'has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Carter v. Jury Commission*, 396 U.S. 320, 340, 90 S.Ct. 518, 529, 24 L.Ed.2d 549 (1970). Where, as here, there is likely to be continuing effects from the use of records of unconstitutional disciplinary proceedings,[16] and plaintiffs' due process rights were clearly established at the time the violations occurred, it is appropriate to re-

16. These records are relied upon in making a range of decisions concerning inmates' future rights and privileges, e. g., parole, furloughs, visitations.

quire the expungement of the records of all disciplinary proceedings conducted in violation of our order. *See Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978); *Ware v. Heyne*, 575 F.2d 593 (7th Cir. 1978); *McKinnon v. Patterson*, 568 F.2d 930 (2d Cir. 1977). We have found that defendant's policy and practice concerning Adjustment Committee Proceedings violates the provisions of our order, and that some practices in Superintendent's Proceedings violated our order as well. These findings relate to events which followed an earlier expungement order issued on June 24, 1977 to remedy violations occurring prior to that time. Therefore, for disciplinary proceedings since June 24, 1977, defendant is to expunge the records of all Adjustment Committee Proceedings and in addition, those Superintendent's Proceedings that plaintiffs demonstrate to the Special Master have been conducted in violation of the order. The Special Master appointed in this case shall hold hearings on this issue, and report to the Court concerning his findings and recommendations.

[21] Plaintiffs also seek damages to compensate for injury suffered as a result of violations of the order. Plaintiffs who have suffered harm because of a violation of the terms of a decree are to be awarded damages to the extent they are established. *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d at 130. Although defendant is entitled to the qualified immunity accorded officials in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) and *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), the immunity defense is unavailing here, where "the con-

stitutional right allegedly infringed was clearly established at the time of [her] challenged conduct," "she knew or should have known of that right, and [she] knew or should have known that [her] conduct violated the constitutional norm." *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 860, 55 L.Ed.2d 24 (1978).

[22–24] To recover damages in a civil contempt action, plaintiffs must show that they suffered actual injury. Damages are not "presumed to flow from every deprivation of procedural due process." *Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1977). Moreover, injury caused by a justified deprivation, including distress, does not justify awarding compensatory damages. 435 U.S. at 264, 98 S.Ct. at 1052.

Here, a significant portion of the harm to plaintiffs will be remedied by our order requiring the expungement of records of disciplinary proceedings that violated our order. With respect to the mental and emotional harm allegedly suffered by plaintiffs, there has not been a sufficient showing of injury actually suffered by individuals whose due process rights were violated. Although plaintiffs argue in their memorandum that such harm occurred, little if any testimony concerning actual injury was presented. Furthermore, there is a question as to which members of the class are actually seeking damages (e. g. the entire class, the inmates who testified at the hearing, those who submitted affidavits).

[25] Even though plaintiffs have not shown actual injury sufficient to support a

substantial damage award, they are entitled to a nominal award to vindicate the deprivation of their rights, because of the "importance to organized society that procedural due process be observed." *Carey v. Piphus*, 435 U.S. at 266, 98 S.Ct. at 1054. Respondents are thus entitled to nominal damages not to exceed one dollar from defendant.

Attorneys Fees

[26] Plaintiffs have requested attorneys fees for services performed in litigating this motion. Under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in an action to enforce a provision of 42 U.S.C. § 1983 "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." We find that plaintiffs' counsel is entitled to recover fees in this case. *See Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Mid-Hudson Legal Services, Inc. v. G. & U., Inc.*, 578 F.2d 34 (2d Cir. 1978). Counsel shall submit affidavits in accordance with the standards set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) and *Beazer v. New York Transit Authority*, 558 F.2d 97 (2d Cir. 1977).

Conclusion

We have found that defendant failed to comply with our order, that plaintiffs have been irreparably harmed and that the harm is of a continuing nature such that injunctive relief is necessary. Therefore, the preliminary injunction entered on June 23,

1975 shall constitute permanent injunctive relief.

Plaintiffs are directed to submit an order in ten days. Defendants may submit objections thereto and any proposed counter-order five days thereafter.

So ordered.

APPENDIX E

June 23, 1975 Order as Modified by the September 17, 1976 Opinion of the Court of Appeals

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EILZABETH POWELL, et al.,

Plaintiffs,

-against- **ORDER**

BENJAMIN WARD, et al.,

Defendants.

This action having come on for hearing before the Court on November 27, December 3, 4, 13 and 16, 1974, Hon. Charles E. Stewart, Jr. presiding, on Plaintiffs' Motion for a preliminary injunction, and the Court, on April 23, 1975, having rendered its findings of fact and conclusions of law, IT IS ORDERED THAT:

1. Defendants shall conduct all Adjustment Committee or Superintendent's Proceedings , or other disciplinary proceedings that may result in an inmate at Bedford Hills Correctional Facility being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures:

(a) Formal written notice of charges must be served on the inmate at least 24 hours before the hearing;
(b) The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of charges served in accordance with Paragraph 1 (a), shall inform the inmate of her right to call witnesses;
(c) If permission to call a witness is denied, the party conducting the hearing shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or corrrectional goals presented by the witness.
(d) At the conclusion of the hearing, the inmate shall be given a written statement of the evidence relied on and the reasons

for any action taken;

(e) No person who has participated in any investigation of the acts complained of, or who was a witness to those acts shall be a member of any Adjustment Committee or Superintendent's Proceeding relating to those acts;

(f) Neither the Deputy Superintendent for Security, nor any person whose job involves direct responsibility for institutional security, shall be a member of any Adjustment Committee or Superintendent's Proceeding at which an inmate is charged with an act which purportedly threatens the security of the prison. [*]

2. If any inmate is confined to Special Housing or segregation "pending investigation" of charges, a hearing must be held within seven days of the date of her confinement. [In unusual or emergency situations, the seven-day requirement may be extended but only with the permission of the Commissioner of Correctional Services or his designee.]+

3. Counsel for Plaintiffs shall notify all members of the Class of the entry of this order. Plaintiffs' counsel shall deliver to Defendant WARNE sufficient copies of the Notice annexed as Exhibit "A", describing this order and the Court's opinion dated April 23, 1975, so that the Notice may be posted as set forth in Paragraph 4.

4. Defendant Warne shall cause copies of the Notice to be placed and affixed in conspicuous places in each building used to house inmates, including the hospital building, the legal library, and the reading library.

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[*] Sub-paragraph (f) was deleted on defendants' appeal to the United States Court of Appeals for the Second Circuit. 542 F.2d 101, 104 (1976).

+Text in brackets was added on defendants' appeal to the United States Court of Appeals for the Second Circuit. 542 F.2d at 104.

APPENDIX F
POWELL v. WARD
Cite as 542 F.2d 101 (1976)

Elizabeth POWELL et al.,
Plaintiffs-Appellees,

v.

Benjamin WARD, Commissioner of Correctional Services and Janice Warne, Individually, and as Superintendent of Bedford Hills Correctional Facility, Defendants-Appellants.

No. 527, Docket 75-2107.

United States Court of Appeals,
Second Circuit.

Argued May 10, 1976.
Decided Sept. 17, 1976

Prisoners brought class action to require officials of two state women's prisons to bring disciplinary proceedings into conformity with procedural due process requirements. The United States District Court for the Southern District of New York, Charles E. Stewart, J., 392 F.Supp. 628, issued a preliminary injunction applicable to inmates at one of the facilities, and prison officials appealed, challenging only two provisions of the injunction. The Court of Appeals, Newman, District Judge, sitting by designation, held that prison officials responsible for maintaining security were not disqualified solely by the nature of their positions from adjudicating allegations of breaches of prison security; and that the order was modified to allow extension, in unusual or emergency situations, of the re-

quirement that hearings for those confined to segregation pending investigation of charges be held within seven days of such confinement.

Affirmed as modified.

1. Administrative Law and Procedure ⇐314

Though, in some circumstances, the nature of one's position or the relationship between that position and the outcome of adjudications disqualifies person from serving with the impartiality mandated by the due process clause, fact that decision maker has responsibilities to uphold standards of conduct does not inevitably mean that he is disqualified from adjudicating allegations that those standards have been breached.

2. Prisons ⇐13

Prison officials responsible for maintaining security are not disqualified solely by the nature of their positions from adjudicating allegations that prison's security has been breached.

3. Prisons ⇐13

Apart from constitutional requirements, advisability of giving prison officials, who are responsible for maintaining prison security, tasks related to adjudicating allegations of breaches of prison security is matter for decision by state legislators and administrators.

4. Prisons ⇐13

District court's order that hearings for prisoners confined in special confinement at state prisons for women pending investigation of charges must be held within seven

days of such confinement was modified to allow extension of the seven-day requirement in unusual or emergency situations, but only with permission of the Commissioner of Correctional Services.

5. Prisons ⇐13

Normal maximum time for giving notice of charges to specially confined prisoners and normal minimum time for a disciplinary hearing after such notice are not to be combined to create a maximum period of prehearing confinement.

Stephen M. Latimer, Bronx Legal Services Corp., New York City (Donald Grajales, Project Director, New York City, on the brief), for plaintiffs-appellees.

Margery Evans Reifler, Asst. Atty. Gen., New York City (Louis J. Lefkowitz, Atty. Gen., Samuel A. Hirshowitz, First Asst. Atty. Gen., New York City, on the brief), for defendants-appellants.

Before MOORE and TIMBERS, Circuit Judges, and NEWMAN, District Judge.*

NEWMAN, District Judge:

In this class action brought on behalf of prisoners at New York's two state prisons for women to bring disciplinary proceedings into conformity with the procedural due process standards enunciated in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), Judge Stewart issued a preliminary injunction applicable to the

* Of the United States District Court, District of Connecticut, sitting by designation.

sub-class of prisoners at the Bedford Hills Correctional Facility. *Powell v. Ward*, 392 F.Supp. 628 (S.D.N.Y.1974). This appeal [1] by defendant prison officials challenged only two provisions of that carefully drawn injunction: paragraph 1(f), concerning the membership of an Adjustment Committee or Superintendent's Proceeding in certain instances, and paragraph 2, concerning the time an inmate may be held in segregation pending a disciplinary hearing.

1. Applying the due process requirement of an impartial fact-finder, Judge Stewart ordered that no person who has participated in the investigation of acts complained of or who has been a witness to such acts could be a member of an Adjustment Committee or Superintendent's Proceeding relating to those acts. Defendants do not challenge this requirement. They do object to the disqualification of "the Deputy Superintendent for Security and any person whose job involves direct responsibility for institutional security" from membership of an Adjustment Committee or Superintendent's Proceeding "at which an inmate is charged with an act which purportedly threatens the security of the prison." Preliminary Injunction, paragraph 1(f). While making no finding that the Deputy Superintendent for Security was actually biased with re-

1. This appeal was initially before a different panel of this Court, which returned the case to the Clerk's office for reassignment in light of appellants' then pending motion for reargument in the District Court to seek reconsideration of the two matters raised on appeal. After receiving papers and hearing oral argument, the District Court declined to modify its order.

spect to any prisoners charged with breaches of prison security, the District Court apparently concluded that the nature of her position and that of others with responsibility for institutional security created a risk of bias sufficient to disqualify such persons from determining allegations of misconduct that threatens the security of the prison.

[1–3] In some circumstances the nature of one's position or the relationship between that position and the outcome of adjudications disqualifies a person from serving with the impartiality mandated by the Due Process Clause. See, *e. g., Ward v. Village of Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). But the fact that a decision-maker has responsibilities to uphold standards of conduct does not inevitably mean that he is disqualified from adjudicating allegations that those standards have been breached. See, *Hortonville Joint School District No. 1 v. Hortonville Education Assn.,* 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Withrow v. Larkin,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In *Wolff v. McDonnell, supra,* the Supreme Court rejected a due process challenge to the impartiality of a prison discipline committee whose chairman was the Associate Warden for Custody. See also *Meyers v. Alldredge,* 492 F.2d 296, 306 (3d Cir.1974); *Braxton v. Carlson,* 483 F.2d 933 (3d Cir.1973). We conclude that prison officials responsible for maintaining security are not disqualified by the Due Process Clause from adjudicating allegations of breaches of prison security

solely by the nature of their positions.[2] Apart from constitutional requirements, the advisability of giving such persons adjudicatory tasks of this nature is a matter for decision by state legislators and administrators who, of course, need not be satisfied with merely meeting the minimum standards of the Constitution.

2. To prevent recurrence of instances of prolonged segregation prior to disciplinary hearings, Judge Stewart ordered that hearings for those confined to Special Housing or segregation pending investigation of charges must be held within seven days of such confinement. Prior to the injunction, the New York Department of Correctional Services had on March 12, 1975, instructed all institutions to accord confined prisoners an Adjustment Committee hearing within three days and a Superintendent's Proceeding within seven days of such special confinement. The administrative directive specifies these time limits "in the absence of exigent circumstances." Defendants' only challenge to the District Court's seven-

2. Plaintiffs assert that the Deputy Superintendent for Security should be disqualified for reasons apart from the nature of her responsibilities. They find "incredible" her testimony that following her return from vacation, she had no specific duties with respect to the disturbance that occurred during her vacation and out of which arose many of the charges of misconduct brought against the plaintiffs. They also point to testimony by one of the plaintiffs critical of the Deputy Superintendent. There is no indication that the District Court doubted the Deputy Superintendent's testimony nor found the type of hostile relationship that in some contexts would warrant disqualification. *Cf. Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971).

day limit is the lack of an exception for truly exigent circumstances. Citing an example of a disturbance involving a substantial number of inmates or violence, defendants urge that the injunction be modified to permit the seven-day limit to be extended "in unusual or emergency situations . . but only with the permission of the Commissioner of Correctional Services or his designee." (Letter from appellants' counsel, April 28, 1976).

[4, 5] While we are not unmindful of plaintiffs' concern that a safety valve for emergency circumstances is capable of abuse, we think the suggested modification, fixing responsibility for exceptions at a responsible level of the Department, is consonant with the flexible standards of the Due Process Clause.[3] Plaintiffs may seek further relief if experience indicates that "emergency circumstances" are being found in unexceptional cases.

Accordingly, the order appealed from is modified by deletion of paragraph 1(f) and by adding to paragraph 2 the following: "In unusual or emergency situations, the seven-day requirement may be extended but only with the permission of the Commissioner of Correctional Services or his designee."

Affirmed as modified.

KEY NUMBER SYSTEM

APPENDIX G

June 23, 1975 Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH POWELL, et al.,

Plaintiffs,

-against-

BENJAMIN WARD, et al.,

Defendants.

74 Civ. 4628
ORDER

This action having come on for hearing before the Court on November 27, December 3, 4, 13 and 16, 1974, Hon. Charles E. Stewart, Jr. presiding, on Plaintiffs' Motion for a preliminary injunction, and the Court, on April 23, 1975, having rendered its findings of fact and conclusions of law, IT IS ORDERED THAT:

1. Defendants shall conduct all Adjustment Committee or Superintendent's Proceedings, or other disciplinary proceedings that may result in an inmate at Bedford Hills Correctional Facility being confined in a Special Housing Unit or Segregation Unit, in accordance with the following procedures:

(a) Formal written notice of charges must be served on the inmate at least 24 hours before the hearing;
(b) The inmate shall be permitted to call witnesses on her behalf provided that so doing does not jeopardize institutional safety or correctional goals. The written notice of 1 (a), shall inform the inmate of her right to call witnesses;
(c) If permission to call a witness is denied, the party conducting the hearing shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented by the witness.
(d) At the conclusion of the hearing, the inmate shall be given a written statement of the evidence relied on and the reasons for any action taken;

(e) No person who has participated in any investigation of the acts complained of, or who was a witness to those acts shall be a member of any Adjustment Committee or Superintendent's Proceeding relating to those acts;

(f) Neither the Deputy Superintendent for Security, nor any person whose job involves direct responsibility for institutional security, shall be a member of any Adjustment Committee or Superintendent's Proceeding at which an inmate is charged with an act which purportedly threatens the security of the prison.

2. If any inmate is confined to Special Housing for segregation "pending investigation" of charges, a hearing must be held within seven days of the date of her confinement.

3. Counsel for plaintiffs shall notify all members of the Class of the entry of this order. Plaintiffs' counsel shall deliver to Defendant WARNE sufficient copies of the Notice annexed as Exhibit "A", describing this order and the Court's opinion dated April 23, 1975, so that the Notice may be posted as set forth in Paragraph 4.

4. Defendant Warne shall cause copies of the Notice to be placed and affixed in conspicuous places in each building used to house inmates, including the hospital building, the legal library, and the reading library.

SO ORDERED.

CHARLES E. STEWART, JR.
United States District Judge

Dated: New York, New York
June 23, 1975.

APPENDIX H

Elizabeth POWELL et al., Plaintiffs,

v.

Benjamin WARD et al., Defendants.

No. 74 Civ. 4628.

United States District Court,
S. D. New York.
April 23, 1975.

Prisoners brought a class action to enjoin officials at two state prisons for women from enforcing prison disciplinary procedures unless they complied with due process. On the prisoners' motion for a preliminary injunction, the District Court, Stewart, J., held that where prisoners who were placed in segregation without the procedural safeguards mandated by the Supreme Court might be wrongfully deprived of many basic rights and privileges which were granted to the general prison population, the prison authorities did not provide written notice of charges against the prisoner, did not provide a written statement of evidence relied on and reasons for the disciplinary decision, and the prisoners were not informed of their right to call witnesses on their own behalf, a preliminary injunction would be granted.

Preliminary injunction granted.

1. Injunction ⇐147

For preliminary injunction to be granted, irreparable harm to plaintiffs must be demonstrated.

2. Injunction ⇐136(2)

Where prison inmates who were placed in segregation without procedural due process might be wrongfully deprived of many basic rights and privileges which were granted to general prison population, prison authorities did not provide written notice of charges against prisoner, did not provide written statement of evidence relied on and reasons for disciplinary decision and prisoners were not informed of their right to call witnesses in their own behalf, prison authorities would be preliminarily enjoined from conducting further disciplinary proceedings which might result in segregation without such procedural safeguards.

3. Prisons ⇐13

Any prison disciplinary proceedings which might result in placement in solitary confinement must conform to procedural due process requirements established by Supreme Court in Wolff v. McDonnell.

4. Prisons ⇐13

Prison authorities had obligation to inform inmates subject to disciplinary proceedings which might result in solitary confinement that they were entitled to call witnesses on their own behalf.

5. Prisons ⇐13

No prison inmate should be confined to segregation for more than seven days while her disciplinary case is pending investigation by disciplinary committee.

6. Administrative Law and Procedure ⇐479

Administrative hearing examiner must be impartial.

7. Prisons ⇐13

Hearing officer in prison disciplinary proceedings should not be investigative officer or witness.

8. Prisons ⇐13

It is improper for prison official whose primary concern is prison security to preside over disciplinary proceedings where inmate's alleged misbehavior purportedly threatened security of the prison.

Bronx Legal Services Corp., Stephen Latimer, New York City, for plaintiffs.

Mortimer Sattler, Asst. Atty. Gen., for defendants.

OPINION

STEWART, District Judge:

This is a class action brought pursuant to 42 U.S.C. § 1983 to enjoin the officials at New York's two state prisons for women from enforcing prison disciplinary procedures unless and until they comply with the guidelines set forth by the Supreme Court last term in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Plaintiffs, prisoners at the Bedford Hills and the Fishkill Correctional Facilities, seek *inter alia*, a preliminary injunction to enjoin defendant prison officials from holding Adjustment Committee disciplinary proceedings without certain procedural

safeguards. Hearings on this motion were held before this Court last November and December, at which time testimony was heard from inmates and prison officials at Bedford Hills. Since those hearings took place prior to the amendment of plaintiffs' complaint to include the Fishkill facility, we limit our consideration of injunctive relief here to inmates at Bedford Hills. [1]

[1, 2] For a preliminary injunction to be granted, irreparable harm to plaintiffs must be demonstrated. Sampson v. Murray, 415 U.S. 61, 88, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974), quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506–07, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). As the Second Circuit has stated:

> [t]he settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury . . . .

Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). We believe that injunctive relief is warranted, since we find that plaintiffs come within the ambit of the first test. Plaintiffs have made a clear showing of probable success on the merits; they will also be irreparably harmed in the absence of injunctive relief, since in-

1. In our order of March 27, 1975, we conditioned our leave to amend the complaint on limiting preliminary injunctive relief, if any, to the subclass of inmates at Bedford Hills, until hearings with respect to Fishkill could be held.

mates who are placed in segregation without the procedural safeguards mandated by Wolff v. McDonnell, *supra*, may be wrongfully deprived of many basic rights and privileges which are granted to the general prison population.

[3] In Wolff v. McDonnell, decided June 26, 1974, the Supreme Court held that prisoners subject to disciplinary proceedings must be accorded the following rights: advance written notice of charges to be given at least 24 hours before a hearing, a written statement by the factfinders of the evidence relied on and the reasons for the disciplinary action, the right to call witnesses and present documentary evidence when doing so does not jeopardize institutional safety or correctional goals, and the right to counsel where the inmate is illiterate or where the issues are unusually complex. 418 U.S. at 563–67, 569–70, 94 S.Ct. 2963, 41 L.Ed.2d 935. As Judge Brieant observed in a similar case involving disciplinary proceedings at Bedford Hills, "While *Wolff* is primarily concerned with disciplinary procedures relating to denial and revocation of good time credit, its holding applies with equal force to disciplinary procedures which may result in placement in solitary confinement." Crooks v. Warne, 74 Civ. 2351 (S.D.N.Y.1974). Slip Op. at 17. We agree that any disciplinary proceedings which may result in placement in solitary confinement must conform to the above-enumerated procedural requirements established by the Supreme Court in Wolff v. McDonnell, *supra*.

In New York, there are two basic types of disciplinary procedures, Superintendent's Proceedings and Adjustment Committee Proceedings. 7 N.Y.C.R.R. §§ 252, 253. The Adjustment Committee Proceeding is "said to be marked by flexibility and non-punitive intent in attempting to effectuate changes in inmate attitude," whereas the Superintendent's Proceeding is "solely disciplinary in nature." Crooks v. Warne, *supra* at 9. Despite different goals and procedures, both types of proceedings may result in solitary confinement.[2] In Crooks v. Warne, *supra*, Judge Brieant found that:

> While there exist a variety of disciplinary procedures available in dealing with the more recalcitrant inmates, such as the Adjustment Committee and Superintendent's Proceedings, there exists only one facility euphemistically denominated "Special Housing" wherein all disciplined inmates are kept under the same conditions of punitive segregation, without regard to the diverse causes and commitment procedures whereby they may be

2. Both Adjustment Committee and Superintendent's Proceedings may result in confinement in a special housing unit or a segregation unit. The two types of punishment are similar, since both entail confinement of inmates separate and apart from the general population. The difference is that inmates in special housing are allowed to commingle with each other, whereas those in segregation are not. 7 N.Y.C.R.R. §§ 300.2(b) and (c). This distinction is unimportant here, since *Wolff* procedures apply to both special housing and segregation.

placed there, or the nature of the misconduct involved.

According to Superintendent [Janice] Warne's testimony, all inmates requiring special custodial confinement are placed in Special Housing. . . . Among the inmates confined in Special Housing are those placed in "administrative" as well as "punitive" segregation, quarantined inmates and protective custody cases.

The Superintendent admitted under cross-examination that no matter how admission to Special Housing was administratively denominated or how diverse were procedures for commitment thereto, there is no difference in the degree of punitiveness of the conditions of a person so confined. This is so whether commitment was by Adjustment Committee Proceedings or Superintendent's Proceedings. Inmates placed in Special Housing are all locked in 23 hours a day, whether committed for punitive, protective or administrative confinement. The rigors are the same.

Id. at 5–6. On the basis of testimony about post-*Wolff* disciplinary proceedings by various Bedford Hills inmates and Superintendent Warne before this Court last November and December, we reaffirm these findings. It is clear that it is still the established practice at the Bedford Hills Correctional Facility to place inmates subject to Adjustment Committee Proceedings in the same Special Housing units used for punishing those disciplined under Superintendent's Proceedings. Consequently, since both

Superintendent's Proceedings and Adjustment Committee Proceedings may result in placement in solitary confinement, inmates subject to either type of proceeding must be accorded the procedural safeguards set forth in Wolff v. McDonnell, *supra*.

In this context, we consider the testimony presented by Bedford Hills inmates and prison officials regarding the Superintendent's Proceedings and Adjustment Committee Proceedings. Seven inmates described the disciplinary procedures they had undergone before both Adjustment Committees and Superintendent's Proceedings. Many of these inmates were placed in special housing for as long as four weeks by the Adjustment Committee "pending investigation" of charges of participating in a major disruptive incident or "riot" which occurred at Bedford Hills on August 29, 1974. The inmates testified that they were never given written notice of the charges against them prior to any Adjustment Committee Proceeding, and that they appeared before the Adjustment Committee weekly for a review of their confinement. These inmates further testified that they did not receive a written statement of the evidence relied upon by the Adjustment Committee or the reasons for the disciplinary action taken. Testimony demonstrated that this procedure was not peculiar to the August 29 disturbance. Inmate Cyndi Reid testified that she appeared before an Adjustment Committee in July 1974, at which time she did not receive a formal written notice of the charges

against her, nor did she receive a written disposition of the findings of the Adjustment Committee and the evidence upon which it relied. Similarly, inmates Margaret Gatling and Diedra Plair testified that they appeared before the Adjustment Committee in late October and early November, two months after the disturbance. They too said they were not given written notice of the charges against them or a written disposition detailing the evidence relied upon and the Adjustment Committee's findings.

Superintendent Warne confirmed in her testimony on cross-examination that written notice of the charges against an inmate are not given to the inmate before the Adjustment Committee Proceeding. Moreover, counsel for defendants conceded during the hearings that no written notice of charges is given to inmates before an Adjustment Committee Proceeding.

The evidence adduced at the hearings in this action confirms the finding hy Judge Brieant that "[t]he prisoner does not receive advance notice of the proceeding and is not given a written copy of the disposition of the charges." Crooks v. Warne, *supra*, at 8. It is thus clear that the defendants have failed to comply with two of the basic procedural requirements set forth by the Supreme Court in Wolff v. McDonnell: they have failed to provide inmates facing Adjustment Committee Proceedings with written notice of the charges against them 24 hours before the proceeding, and they have failed to provide the inmates with a written statement of the dispositions

of the Adjustment Committee, together with a statement of the evidence relied on and the reasons for any disciplinary action taken.

We are thus constrained preliminarily to enjoin the defendants from utilizing Adjustment Committee Proceedings unless and until the inmates are provided with written notice of the charges against them at least 24 hours before a hearing, and unless and until the inmates are given a written statement by the factfinders of the evidence relied upon and the reason for the decision.

Plaintiffs further seek to enjoin defendants from holding Adjustment Committee Proceedings unless and until inmates are permitted to call witnesses in their defense, provided that there is no threat to institutional safety or correctional goals. Wolff v. McDonnell clearly mandates this procedure. Although no inmate testified that she was denied the right to call witnesses at an Adjustment Committee Proceeding, Gerald Burke, Director of Special Housing Units for the New York State Department of Correctional Services, testified on cross-examination that witnesses are not given the opportunity to present witnesses on their behalf at Adjustment Committee Proceedings.[3] This testimony was not contradicted by any other witness.

3. Although Burke modified this statement by explaining that presumably an inmate could request that the Adjustment Committee call certain witnesses on her behalf, he said he had no knowledge that this had ever occurred.

Moreover, Judge Brieant stated in Crooks v. Warne that the defendants there had conceded that the *Wolff* procedures must be utilized in prison disciplinary proceedings at Bedford Hills, thus agreeing that inmates subject to Adjustment Committee Proceedings must be allowed to call witnesses on their behalf. Crooks v. Warne, *supra*, at 17.

Testimony at the hearings regarding the Superintendent's Proceedings demonstrated that inmates are generally given formal written notification of the charges pending against them. For example, inmates Cyndi Reid and Margaret Gatling testified that they received written notice of the charges against them at least one day before their Superintendent's Proceedings were held. Inmate Marsha Padilla testified, however, that she did not receive written notice of the charges against her until the evening before her Superintendent's Proceeding. She further testified that she was not given a copy of the charges against her, although she was allowed briefly to look at the formal charges. Although inmates at Superintendent's Proceedings are generally given written notification of the charges 24 hours before their Superintendent's Proceedings, we conclude that injunctive relief is warranted here to assure inmates at Bedford Hills that the standards of Wolff v. McDonnell are met in all instances.

[4] There was little testimony presented regarding the right of inmates to call witnesses on their behalf at Superintendent's Proceedings. In-

mate Margaret Gatling testified that she understood that inmates were not allowed to call their own witnesses at Superintendent's Proceedings. This testimony was not contradicted by either Superintendent Warne or Frances Clement, Deputy Superintendent for Security Services, who conducted numerous Superintendent's Proceedings. Significantly, no instance was cited where an inmate did call witnesses on her behalf. Moreover, the inmates' descriptions of the Superintendent's Proceedings, which we find credible, indicate that inmates were not asked if they wished to call witnesses on their behalf. Although inmates might have been allowed to call witnesses, had they asked, we believe defendants have an obligation to inform inmates that they are entitled to call witnesses at Superintendent's Proceedings. We thus believe that injunctive relief is again appropriate against defendants to assure inmates that this aspect of *Wolff* procedures will be followed.

Finally, although testimony at trial indicated that inmates in some instances have received written statements of the evidence relied upon and of the reasons for their disposition, neither Warne nor Clement testified that this was the standard procedure. Thus, we believe injunctive relief against defendants also is warranted on this point.

[5] We conclude that *Wolff* procedures must be followed for both Adjustment Committee Proceedings and Superintendent's Proceedings, and that for all proceedings which may result in confine-

ment in special housing: (1) formal written notification of the charges must be given to the inmate at least 24 hours before the hearing; (2) at the hearing the inmate may call witnesses on her behalf, provided that doing so does not jeopardize institutional safety or correctional goals; (3) at the conclusion of the hearing the prisoner shall be given a written statement of the evidence relied on and the reasons for any action taken. This holding does not preclude plaintiff from being "confined administratively for that brief period required to draft and file charges and to give the required 24 hours written notice of hearing following any alleged episode involving violence or assaultive or disruptive behavior." Crooks v. Warne, *supra*, at 25. Moreover, we believe that no prisoner should be confined to special housing for more than seven days while her case is "pending investigation" by the Adjustment Committee.

We agree with Judge Brieant that:

> So long as Bedford Hills continues to provide only one kind of segregated confinement . . . similar disciplinary due process safeguards must attend all such inmates who are placed therein. It is implicit in *Wolff* that should the administration see fit to provide separate facilities for "keeplock" or administrative segregation, without so great a diminution of privileges as attends punitive segregation, that full *Wolff* procedures are not necessarily applicable.

Crooks v. Warne, *supra*, at 25–26. [4]

Finally, we must decide the extent to which officers involved in the incident of alleged misbehavior or with alleged conflicts of interest should be barred from presiding over disciplinary proceedings. Inmates Margaret Gatling and Marsha Padilla testified that Lieutenant Wilson had participated in the investigation of the August 29 incident at Bedford Hills and later sat on Adjustment Committee Proceedings involving their purported misbehavior. This testimony was uncontradicted. There was also testimony by Deputy Superintendent Clement that she sat as hearing officer at Superintendent's Proceedings involving alleged acts of misbehavior occurring on August 29th. Counsel for plaintiffs urges that her position as Deputy Superintendent for Security Services created an impermissible degree of bias, since the charges in those proceedings involved perceived threats to the security of the institution, a subject of direct concern to Deputy Superintendent Clement.

[6–8] It is standard administrative law that an administrative hearing ex-

4. Judge Brieant also found that "[i]n the event that the administration concludes upon the basis of an objective factual determination made in good faith by a disinterested official that plaintiff must be kept away from the general prison population, such non-punitive segregation must be so calculated as to grant her every privilege or benefit that may be conferred. Such administrative segregation cannot be imposed on the same basis as punitive segregation." Crooks v. Warne, supra at 24.

aminer must be impartial. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Neither *Wolff* nor Sostre v. McGinnis, 442 F.2d 178 (2d Cir.), cert. denied, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1971), the leading pre-*Wolff* prisoners' rights case, establishes specified criteria for neutral and detached hearing officers. We believe, however, that it is implicit in the notions of fairness in the due process clause that a hearing officer should not have been an investigative officer or witness. Crooks v. Warne, *supra*, at 19. We also conclude that it is improper for a prison official whose primary concern is prison security to preside over Superintendent's Proceedings (or Adjustment Committee Proceedings) where the alleged misbehavior purportedly threatened the security of that same institution. We thus enjoin defendants from holding disciplinary proceedings which may result in confinement in special housing where either hearing officers have been witnesses or investigative officers, or the Deputy Superintendent for Security Services or someone similarly situated presides over hearings concerning incidents which purportedly threaten the security of the prison.

This opinion shall be considered the findings of fact and conclusions of law in accordance with Rule 52(a), F.R.Civ. P. Settle order on five days notice.

So ordered.

APPENDIX I

NEW YORK STATE CORRECTION LAW

Article 6. Management of Correctional Facilities

§ 112. Powers and duties of commissioner of correction relating to correctional facilities

1. The commissioner of correction shall have the superintendence, management and control of the correctional facilities in the department and of the inmates confined therein, and of all matters relating to the government, discipline, policing, contracts and fiscal concerns thereof. He shall have the power and it shall be his duty to inquire into all matters connected with said correctional facilities. He shall make such rules and regulations, not in conflict with the statutes of this state, for the government of the officers and other employees of the department assigned to said facilities, and in regard to the duties to be performed by them, and for the government and discipline of each correctional facility, as he may deem proper, and shall cause such rules and regulations to be recorded by the superintendent of the facility, and a copy thereof to be furnished to each employee assigned to the facility.

§ 137. Program of treatment, control, discipline at correctional facilities

2. The commissioner shall provide for such measure as he may deem necessary or appropriate for the safety, security and control of correctional facilities and the maintenance of order therein.

6. The superintendent of a correctional facility may keep any inmate confined in a cell or room, apart from the accommodations provided for inmates who are participating in programs of the facility, for such period as may be necessary for maintenance of order or discipline, but in any such case the following conditions shall be observed:

(a) The inmate shall be supplied with a sufficient quantity of wholesome and nutritious food, provided, however, that such food need not be the same as the food supplied to inmates who are participating in programs of the facility;

(b) Adequate sanitary and other conditions required for the health of the inmate shall be maintained;

(c) Where such confinement is for a period in excess of twenty-four hours, the superintendent shall arrange for the facility health services director, or a registered nurse or physician's associate approved by the facility health services director to visit such inmate at the expiration of twenty-four hours and at least once in every twenty-four hour period thereafter, during the period of such confinement, to examine into the state of health of the inmate, and the superintendent shall give full consideration to any recommendation that may be made by the facility health services director for measures with respect to dietary needs or conditions of confinement of such inmate required to maintain the health of such inmate; and

(d) The superintendent shall make a full report to the commissioner at least once a week concerning the condition of such inmate and shall forthwith report to the commissioner any recommendation relative to health maintenance or health care delivery made by the facility health services director that is not endorsed or carried out, as the case may be by the superintendent.

APPENDIX J

NEW YOR STATE CODES, RULES AND REGULATIONS

CHAPTER V STANDARDS—BEHAVIOR & ALLOWANCES§251.2

PART 251

INITIAL ACTIONS IN CASES OF INMATE MISBEHAVIOR

Sec.		Sec.	
251.1	General policy	251.5	Minor infractions
251.2	Use of physical force	251.6	Confinement
251.3	Reports of use of physical force	251.7	Admission to special housing units
251.4	Reports of misbehavior		

Historical Note

Part (§§251.1-251.6) added, filed Sept. 17, 1970 eff. Oct. 19, 1970

Section 251.1 General policy. All incidents of inmate voilations of rules and regulations, inmate misbehavior and inmate failure or refusal to comply with an instruction given by an employee acting within the scope of his official duties shall be handled as quietly and routinely as possible, giving due regard to danger to life, health, security and property.

Historical Note

Sec. added, filed Sept. 17, 1970 eff. Oct. 19, 1970.

251.2 Use of physical force (a) The greatest caution and conservative judgment shall be applied in determining: (1) whether physical force is necessary; and (2) the degree of such force that is necessary. Each employee is personally charged under law and the policies of the department with responsibility for acting in good faith, with reasonable care and upon probable cause.

(b) Where it is necessary to use physical force, only such degree of force as is reasonably required shall be used.

(c) Unless there is an immediate danger to safety, security or property, an employee shall notify the superintendent of any situation where the use of physical force may be or become necessary and shall not attempt to use physical force except in accordance with instructions received from the person designated by the superintendent to take charge of such situation.

(d) An employee shall not lay hands on or strike an inmate unless the employee reasonably believes that the physical force to be used is reasonably necessary: for self-defense; to prevent injury to person or property; to enforce compliance with a lawful direction; to quell a disturbance; or to prevent an escape.

(e) An employee may use a weapon, other than a firearm (e.g. a club or gas) only when and to the extent that the employee reasonably believes such use is necessary: for self-defense; to prevent a serious assault or gross destruction of property; to quell a disturbance; or to prevent an escape. Where it is necessary to use such a weapon the employee should take due care to avoid, to the best of his ability in the circumstances, the infliction of serious physical injury.

(f) Firearms and deadly physical force shall not be used except as a last resort, and then only in situations where the employee reasonable believes that deadly physical force is necessary:

(i) to defend himself or a third person from what he reasonably believes to be the unlawful use or immediate danger of unlawful use of the kind of physical force that is readily capable of causing death or other serious physical injury;

(ii) to prevent or terminate what he reasonably believes to be the commission or attempted commission of arson; or

(iii) to prevent the excape of an inmate from the correctional facility or from custody while in transit thereto or therefrom.

(2) Where it is necessary to use a firearm, the weapon shall, whenever possible, to bused to disable rather than to kill. Before aiming a firearm at any person an employee shall, whenever possible, give due warning, orally, or by firing a shot into the air or in some other readily understandable manner.

Historical Note

Sec. added, filed Sept. 17, 1980 eff. Oct. 19, 1970

251.3 Reports of use of physical force. (a) An employee who has used physicial force on an inmate shall make a written report in prescribed form immediately to the superintendent.

(b) Copies of all such reports shall be forwarded to the commissioner within 24 hours, excluding Saturdays, Sundays and holidays.

Historical Note

Sec. added, filed Sept. 17, 1970 eff. Oct. 19, 1970.

251.4 Reports of misbehavior. (a) Every incident of inmate misbehavior involving danger to life, health, security or property must be reported to the superintendent as soom as practicable.

(b) Such report shall be made in writing by the employee who has observed the incident or who has ascertained the facts, and where more than one employee has personal knowledge of the facts, a report shall be made by each such employee or, where appropriate, each such employee shall endorse his name on a report made by one employee.

(c) In any case where more than one inmate was involved in any such incident the report shall indicate the specific role palyed by each inmate, or if the specific role of each if unkown the report shall so indicate.

(d) Where an employees suspects but is not reasonably sure that an inmate was involved in any such incident, the report should so indicate and sould set forth the facts that give rise to said suspicion.

Historical Note

Sec. added, filed Sept. 17, 1970 eff. Oct. 19, 1970.

251.5 Minor infractions. (a) An employee should deal with minor infractions, or other violations of rules and policies governing inmate behavior, that do not involve danger to life, health, security or property by counseling, warning, and/or reprimanding the inmate, and the employee need not report such minor incidents.

(b) Where an inmate persists in failure or refusal to adhere to rules and policies governing inmate behavior, or where an inmate's attitude is not satisfactory, after counseling, warning and/or reprimand, the employee should report such fact to the superintendent in the manner provided in section 251.4 of this Part.

(c) In any case where a report is not made, the employee may, in his discretion, file an infraction slip on the form and in the manner prescribed. Such slip shall be retained for references in the file of the inmate and no further action need be taken unless the superintendent directs the adjustment committee to review the matter.

Historical Note

Sec. added, filed Sept. 17, 1980 eff. Oct. 19, 1970

251.6 Confinement. (a) Where an officer has reasonable grounds to believe that an inmate should be confined to his cell or room because he represents an immediate threat to the safety, security or order of the facility or an immediate danger to other persons or to property, such officer shall take reasonable and appropriate steps to so confine the inmate.

(b) An inmate also may be confined to his cell or room where such action appears reasonably necessary for protection of the inmate. In any such case, however, the inmate shall not be so confined for more than 72 hours, and within such time period the inmate shall either be:

(1) transferred to another housing unit;
(2) scheduled for transfer to another facility;
(3) released from such confinement.

(c) An inmate who is unable or who refuses to participate in an assigned activity may be confined to his cell or room and, if such inmate has not been excused for medical reasons, the officer having charge of the inmate shall report such incident to the superintendent in the manner provided in section 251.4 of this Part.

(d) If the officer having charge of an inmate or if any superior officer has reasonable grounds to believe that an inmate's behavior in his cell or room is disruptive or will be disruptive of the order and discipline of the housing unit, or is inconsistent with the best interests of the inmate or of the facility, such fact shall be reported to the superintendent and the superintendent may order confinement in a special housing unit. Any such order shall be in accordance with Part 304 of Chapter VI of the rules and regulations of the department.

(e) (1) An employee who places an inmate in confinement in his cell or room or who places an inmate in a special housing unit pursuant to the provisions of this section shall report such fact, in writing, to the superintendent as soon as possible, but in any event before going off duty. Where an inmate is placed in confinement or in a special housing unit in connection with an incident required to be reported in the manner provided in section 251.4 of this Part, the report of confinement shall be entered upon and made part of the report of the incident.

(2) Reports of confinement shall be made even where confinement was authorized or directed by a superior officer, but need not be made where confinement:

(i) is necessitated by a medically excused inability to participate in an assigned activity; or

(ii) was directed by the adjustment committee or by a decision in a superintendent's proceeding.

(f) The provisions of this section shall not be construed so as to prohibit emergency action by the superintendent of the facility and, if necessary for the safety or security of the facility, all inmates or any segment of the inmates in a facility may, on the order of the person in charge of the facility, be confined in their cells or rooms for the duration of any period in which the safety or security of the facility is in jeopardy. In any such case the superintendent shall immediately notify the commissioner.

Historical Note

Sec. added, filed Sept. 17, 1970 eff. Oct. 19, 1970.

251.7 Admission to special housing units. [Statutory authority: Correction Law, §§112, 137] Detention admission, adjustment admission or protective admission of an inmate to a special housing unit shall be in accord with Part 304 of this Title.

Historical Note

Sec. added, filed Nov. 21, 1974 eff. Dec. 2, 1974.

PART 252
ADJUSTMENT COMMITTEES

Sec.
252.1 Establishment of adjustment committees
252.2 Role of adjustment committee
252.3 Evaluation of
252.3 Evaluation of alleged incidents of inmate misbehavior
Sec.
252.4 Dispositions by adjustment committee
252.5 Adjustment committee action
252.6 Review of adjustment committee dispositions

Historical Note

Part (§§252.1-252.6) filed Sept. 17, 1970 eff. Oct. 19, 1970.

Section 252.1 Establishment of adjustment committees. [Additional statutory authority: Correction Law, §§ 112, 137] (a) There shall be in each correctional facility a committee to be known as the "adjustment committee".

(b) Such committee shall consist of three employees designated by the superintendent, at least one of whom shall be an officer of the rank of lieutenant or higher and one of whom shall be an employee who is not a member of the uniformed service.

(c) The superintendent may designate persons to serve permanently on such committee or may rotate membership or appoint one or more members to serve permanently and rotate other members. The superintendent also shall designate alternate members to serve in the event of absence or disability of any member.

(d) Each such committee shall have a chairman designated by the superintendent from among the members and the chairman shall be responsible for the proper operation of the committee.

(e) At the time a designation is made, the superintendent shall cause the name of the person designated as chairman, member or alternate, as the case may be, to be recorded and a file thereof maintained as official records of the facility.

(f) In any correctional facility with an inmate population of 150 or less the employee in charge of program or if such person be the superintendent, then the superintendent of his designee shall perform the function of the adjustment committee.

Historical Note

Sec. filed Sept. 17, 1970; amds filed: Nov. 21, 1974; Feb. 3, 1978 eff. Feb. 3, 1978. Amended (f).

252.2 Role of adjustment committee. The basic purposes of the adjustment committee of a facility shall be as follows:

(a) To ascertain the full and complete facts and circumstances of the incidents of inmate misbehavior alleged in reports to the superintendent;

(b) To ascertain the underlying causes of each such incident;

(c) To take appropriate steps to secure future compliance by such inmates with the policies of the department; and

(d) To recommend to the superintendent such changes in programs and procedures of the facility as may seem desirable in order to eliminate, to the extent practicable, factors that tend to contribute to the causes of inmate misbehavior or to improve the methods of dealing with same.

Historical Note

Sec. filed Sept. 17, 1970 eff. Oct. 19, 1970.

252.3 Evaluation of alleged incidents of inmate misbehavior. [Additional statutory authority: Correction Law, §§ 112, 137] (a) Meetings of the adjustment committee shall be convened, pursuant to order of the superintendent, at such times as may be necessary and appropriate to carry out the work of the committee, but at least once each week.

(b) The committee shall receive promptly from the superintendent:

(1) A copy of each report or misbehavior required to be made under, or in the manner provided by, section 251.4 of this subchapter; and

(2) A copy of any infraction slip made under section 251.5 of this Subchapter that the superintendent deem appropriate for attention of the committee.

(3) In addition to reports received from the superintendent, the committee may receive from the inmate in question, should he wish to prepare such, a written report responding to any and all misbehavior reports received by the committee.

(c) The committee shall review each such report or slip for the purpose of determining: whether it is properly made out; whether it states a violation of the rules or policies governing inmate behavior; and whether the facts and circumstances are set forth with sufficient clarity and detail to furnish a basic understanding of the matter. The committee also shall review the information in the files of the facility pertaining to the background and adjustment problems of the inmates involved.

(d) Such review may be performed by the committee, as a whole, or by a member thereof assigned to such review by the chairman. In any case where the chairman is of the opinion that the report or slip is not properly made out or does not state a violation of the rules or policies governing inmate behavior, and in any case where the chairman is of the opinion that the facts and circumstances as conveyed to the committee are not sufficient to set forth a basic understanding of the incident, infraction or action taken, the chairman may direct a further investigation, and the chairman may interview any employee or inmate for such purpose. Information obtained in any such interview shall be summarized, in writing, in a supplementary report to be prepared by the chairman and, whenever practicable, such supplementary report shall be countersigned by the person who supplied the information.

(e) The committee also shall endeavor to obtain from the inmate as full and complete an explanation of his behavior in the situation as possible. Such information shall be summarized, in writing, by the chairman and the summary shall be annexed to the report. After interviewing the inmate, the committee may adjourn the matter for further investigation, or may dispose of the matter as provided in section 252.4 of this Part.

(f) Where an inmate is being held in confinement in his cell or room or in a special housing unit, the committee shall interview the inmate at its first meeting following the date of confinement. If the committee is not prepared to make a disposition at that time, the committee shall decide at that time whether the inmate is to be released from such confinement or is to remain in confinement pending disposition of the matter by a superintendent's proceeding.

Historical Note

Sec. filed Sept. 17, 1970; amds filed: Nov. 21, 1974; May 15, 1975; May 14, 1980 as emergency measure eff. May 14, 1980. Added (b)(3).

252.4 Dispositions by adjustment committee. [Additional statutory authority: Correction Law, §§ 112, 137] (a) All dispositions by the adjustment committee shall be in accordance with the provisions of this section.

(b) The adjustment committee may adopt any one of the following courses of action:

(1) where the committee is of the opinion that the misbehavior report or infraction slip was not appropriately issued, the committee shall recommend to the superintendent that the report or slip be nullified;

(2) where the committee is of the opinion that an inmate's behavior may have constituted a grave danger to life, health or security or has constituted a danger to a substantial amount of property and that a disciplinary sanction is necessary for the purpose of general or individual deterrence or for the purpose of preserving norms of acceptable behavior in the institution at large, the committee shall recommend to the superintendent that a superintendent's proceeding be held;

(3) where the committee is of the opinion that a formal findings as to whether an inmate violated a particular rule or regulation is necessary, irrespective of whether a superintendent's proceeding is required under paragraph (2) of this subdivision, the committee shall recommend to the superintendent that a superintendent's proceeding be held;

(4) where the committee is of the opinion that it may secure compliance by an inmate with the policies of the department through guidance and counseling and that the only measures needed will be those that are directed specifically at control of the behavior of the particular inmate, the committee shall proceed as provided in section 252.5 of this Part;

(5) where the committee proceeds in accordance with paragraph (4) of this subdivision and an inmate persists in failure or refusal to follow the guidance and counseling of the committee, the committee shall recommend to the superintendent that a superintendent's proceeding be held;

(6) where the committee is of the opinion that an employee has acted improperly and is in need of further training, counseling or disciplinary action, it shall report such finding to the superintendent; or

(7) the committee may proceed as provided in this subdivision and recommend reappraisal of the program of one or more inmates in a report to the superintendent.

(c) In any case where information developed by the committee in the course of its official functions leads to the conclusion that a change in the programs or procedures of the facility appears to be desirable in order to eliminate a factor that tends to contribute to the causes of inmate misbehavior, or to improve a method of dealing with same, the committee shall transmit its recommendation for such change to the superintendent. The superintendent shall then append his comments thereto and forward the recommendation, along with his comments, to the commissioner.

(d) All dispositions made by the committee and all action, recommendations, and reports of the committee shall, except as otherwise specifically provided in this Part, be pursuant to decision of at least two members.

Historical Note

Sec. filed Sept. 17, 1970; amd. filed Nov. 21, 1974 eff. Dec. 2, 1974. Substituted new (b).

252.5 Adjustment committee action. [Additional statutory authority: Correction Law, §§ 112, 137] (a) The objective of adjustment committee action authorized by paragraph (4) of subdivision (b) of section 252.4 of this Part shall be to secure the inmate's understanding of and adherence to the department's rules and policies governing inmate behavior.

(b) The action to be taken by the committee shall be based upon its evaluation of the inmate's attitude and his overall adjustment to the order and programs that must be maintained in the facility, as well as upon the committee's evaluation of the facts and circumstances of the particular incident described in the report or slip. The committee shall not be required to make a finding as to whether an inmate violated any particular rule or regulation and

shall not direct the action it takes toward the objective of imposing punishment for a violation. The action taken by the commitee shall be focused upon the degree to which the inmate has been and is cooperating with the policies, rules and programs of the department and the facility.

(c) The committee shall give guidance to the inmate with respect to the reason for the rule or policy involved and the need for compliance with the rules and policies of the department, and the committee shall point out the elements of the inmate's behavior or attitude that it deems to be unsatisfactory.

(d) Where the committee is of the opinion that the inmate has formed a genuine intention to cooperate, and that he will do so to the best of his ability without further action by the committee, it may defer action in accordance with subdivision (g) of this secion and so advise the inmate. In any such case, the committee also shall advise the inmate that further unsatisfactory behavior may necessitate restriction of his activities or a formal charge against him.

(e) Where the committee is of the opinion that present action is necessary in order to bring the behavior of the inmate within acceptable limits, the committee may restrict the activities of the inmate to the extent appropriate for control of the inmate. For this purpose the committee may impose one or more of the following restrictions; except that a person performin the function of the committee, pursuant to subdivision (f) of section 252.1 of this Part, may only impose the restriction specified in paragraph (1) of this subdivision:

(1) loss of one or more specified privileges for a specified period not exceeding 30 days;

(2) confinement to his cell or room continuously or on certain days or during certain hours for a specified period up to but not exceeding seven days; or

(3) where the inmate's behavior is such that his presence in a general housing unit disrupts the order of that unit or is inconsistent with the best interests of the facility or of the inmate, confinement in a special housing unit; provided, however, that in such case the adjustment committee, pursuant to section 252.4(b)(2) of this Part, shall immediately recommend to the superintendent that a superintendent's proceeding be held.

(f) In any case where the committee imposes a restriction upon the activities of an inmate, the committee may direct that the inmate appear before it at a specified time during the period of the restriction for the purpose of determining whether there has been any change in the attitude of the inmate that would tend to assure his future cooperation with the policies of the department. Where the committee is of the opinion that such a change has occurred, it may discontinue the restriction or restrictions imposed or any portion thereof.

(g) The committee may, at any time, defer action or further action with respect to an inmate for a period of up to three months. In such case, the inmate shall be advised that his behavior is subject to continous appraisal by the committee and that further action may be taken if his behavior does not improve. The officers having charge of the inmate may be notified of this fact and may be directed to forward written comments on the inmate's adjustment to the committee.

Historical Note

Sec. filed Sept. 17, 1970; amds. filed: Nov. 21, 1974; May 15, 1975; May 14, 1980 as emergency measure eff. May 14, 1980. Amended (e)(2).

252.6 Review of adjustment committee dispositions. [Additional statutory authority; Correction Law, §§ 112, 137] All dispositions of the adjustment committee shall be subject to review in accordance with sections 270.1 and 270.3 of this Title.

Historical Note

Sec. filed Sept. 17, 1970; repealed, new filed Nov. 21, 1974 eff. Dec. 2, 1974.

PART 253
SUPERINTENDENT'S PROCEEDING

Sec.
253.1 Authorization
253.2 Formal charge and designation of presiding officer
253.3 Notice and assistance to inmate
253.4 Method of determination
253.5 Dispositions
253.6 Review of superintendent's proceeding disposition

Historical Note

part (§§ 253.1-253.5) filed Sept. 17, 1970 eff. Oct. 19, 1970.

Section 253.1 Authorization. (a) In any case where there is reasonable cause to believe that an inmate's behavior has constituted a danger to life, health, security or property, or that an inmate has deliberately failed or has refused to follow the guidance and counseling of the adjustment committee, the superintendent may direct that a superintendent's proceeding be held.

(b) Such action may be taken irrespective of whether a matter is pending before the adjustment committee and irrespective of whether the committee has recommended that a proceeding be held.

Historical Note

Sec. filed Sept. 17, 1970 eff. Oct. 19, 1970.

253.2 Formal charge and designation of presiding officer. [Additional statutory authority: Correction Law, §§ 112, 137] (a) Upon directing that a superintendent's proceeding be held, the superintendent shall designate an employee to file a formal charge against the inmate and the superintendent shall appoint a person to conduct the proceeding.

(b) The formal charge shall consist of a written specification of the particulars of the incident of behavior involved and the date, time and place of such incident. Where two or more incidents are involved, all may be incorporated in a single charge but each msut be separately stated. In any case where a report has been made under Part 252 of this Chapter such report, if it sets forth the above details, may be converted into a formal charge by endorsing such fact thereon.

(c) The formal charge shall include a notice to the inmate substantially as follows:

> "you are hereby advised that no statement made by you in response to the charge or information derived therefrom may be used against you in a criminal action or proceeding."

(d) The person appointed to conduct the proceeding should be either the superintendent, a deputy superintendent, or captain, but the superintendent may, if sufficient reason exists, designate some other employee to conduct the proceeding. The following persons shall not, however, under any circumstances be appointed to conduct the proceeding: a person who actually witnessed the incident; a person who was directly involved in the incident; the perosn who prepared the formal charge. A person shall not be deemed to be ineligible to conduct the proceeding solely by reason of the fact that he served as a member of the adjustment committee and reviewed or considered the incident in that capacity.

Historical Note

Sec. filed Sept. 17, 1970; amds. filed: Nov. 21, 1974; Feb. 3, 1978 eff. Feb. 3, 1978. Amended (d).

253.3 Notice and assistance to inmate. [Additional statutory authority: Correction Law, §§ 112, 137] (a) The person appointed to conduct the hearing shall designate an employee to furnish assistance to the inmate. This assistance shall be solely of an investigatory nature. The employee is not intended to and may not act as an advocate for the inmate. If the inmate elects, such employee shall be of the inmate's choice selected from a list of available employees established by the superintendent, or any other employee upon approval of the superintendent.

(b) Such employee shall deliver a copy of the charge to the inmate at least 24 hours prior to the commencement of the superintendent's proceeding. He shall explain the nature of the proceeding and the charge to the inmate. He also shall ask the inmate whether there is any factual matter that can be presented in his behalf and he shall investigate any reasonable factual claim the inmate may make.

(c) A written report of the action taken and the results of the investigation, if any, including documentary evidence and statements of witnesses interviewed, by the person designated to furnish assistance to the inmate shall be delivered to the person appointed to conduct the proceeding prior to the commencement of the procedure for determination of the charge.

Historical Note

Sec. filed Sept. 17, 1970; amds. filed: Nov. 21, 1974; May 15, 1975; May 14, 1980 as emergency measure eff. May 14, 1980. Amended (a).

Decisions

1. Right to judicial review

Held that although the decisions of the Correction Department are not judicially reviewable if made according to law, where petitioner prisoner's claim that he was denied a hearing conducted in accordance with the provisions of the rules and regulations of the department (7 NYCRR 253.3) before being deprived of 90 days good time is uncontroverted, an issue is presented requiring a hearing in the Supreme Court to determine whether such decision was made in violation of lawful procedure. *Matter of Salinas v. Henderson*, 40 AD2d 939 (1972).

253.4 Method of determination. [Additional statutory authority: Correction Law, §§ 112, 137] (a) The person appointed to conduct the proceeding shall first interview the inmate and ascertain that he understands that no statement made by him in response to the charge or information derived therefrom may be used against him in a criminal action or proceeding.

(b) Then the person conducting the proceeding shall ask the inmate whether he admits or denies the substance of the charge. If the inmate admits the substance of the charge, or admits any variation of the charge that is acceptable to the interviewer, the inmate shall sign his name in the place indicated for that purpose. Where the admission accepted differs from the charge made, the points of difference shall be noted on the charge by the interviewer before the inmate signs. After the inmate has signed, as hereinabove provided, a disposition shall be made. If the inmate does not make any such admission, or refuses to sign, the proceeding shall continue as provided in this section and all further interviews shall be recorded stenographically or be an electronic recording device.

(1) The inmate shall be permitted to call witnesses on his/her behalf, provided that so doing does not jeopardize institutional safety or correctional goals.

(2) Where the inmate is illiterate, or where the charges are especially complex, the person conducting the proceeding may allow the inmate to select an employee to assist him at the hearing.

(c) The person conducting the proceeding shall interview one or more employees who witnessed or have direct knowledge of the incident and he may also interview any other person who can be of assistance in contributing relevant information.

(d) In any case where there are written reports on the incident, or where the matter has been before the adjustment committee, the reports and the records of the adjustment committee shall be deemed to be incorporated into the record of the proceeding and may be considered by the person conducting the proceeding without the necessity of formally reading same into the record.

(e) The person conducting the proceeding shall then once again interview the inmate and shall advise him of the factual circumstances that appear to support the charge and shall afford him an opportunity to comment thereon and to make any statement he may care to submit with respect to the charge.

(5) Confinement as authorized in paragraph (4), but on a diet that is not the same as the diet of other inmates, provided, however, that the inmate shall at all times be supplied with a sufficient quantity of wholesome and nutritious food;

(6) restitution for loss of or intentional damage to State property, to be made from existing and future funds standing to the credit of the inmate;

(7) loss of a specified period of good behavior allowance ('good time'), subject to restoration as provided in Subchapter B of this Chapter; or

(8) referral to the adjustment committee for such action or further action as may be deemed appropriate by the committee (within the limits of the action the committee is authorized to take).

(b) Where the inmate admits and signs, or where the person conducting the hearing affirms on the basis of substantial evidence, a charge or state of facts which, although not within the criteria set forth in section 253.1, nevertheless amounts to a breach of rules and regulations or established standards governing inmate behavior, one or more of the following dispositions may be made:

(1) reprimand;

(2) any action that the adjustment committee would have been authorized to take;

(3) temporary or permanent change or program;

(4) restitution for loss of or intentional damage to State property, to be made from existing and future funds standing to the credit of the inmate;

(5) loss of a specified period of good behavior allowance ("good time"), subject to restoration as provided in Subchapter B of this Chapter; or

(6) referral to the adjustment committee for such action or further action as may be deemed appropriate by the committee (within the limits of the action the committee is authorized to take).

(c) The disposition shall be endorsed, in writing, upon the record and the person conducting the proceeding shall personnally advise the inmate of the disposition made.

Historical Note

Sec. filed Sept. 17, 1980; amds. filed: Nov. 21, 1974; May 15, 1975 eff. May 19, 1975. Amended (a)(4).

253.6 Review of superintendent's proceeding dispositions. [Additional statutory authority: Correction Law, §§ 112, 137] (a) A superintendent's proceeding shall be subject to automatic review by the commissioner in accordance with section 270.2 of this Title.

(b) Any inmate shal have the right to appeal the disposition of any superintendent's proceeding, to which he was a party, to the commissioner or his designee within 30 days of receipt by the inmate of said disposition.

Historical Note

Sec. filed Nov. 21, 1974; amd. filed May 14, 1980 as emergency measure eff. May 14, 1980.